TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted]31

PACIFIC GAS & ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, AND HON. J. J. HENDERSON, JUDGE THEREOF, ET AL.

IN ERROR TO THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA.

FILED APRIL 17, 1917.

(25,908)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 2, 1917.

1 In the Supreme Court of the United States.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Plaintiff in Error,

vs.

POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and Hon. J. J. Henderson, Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge Presiding in Department One Thereof, Defendants in Error.

Petition for Allowance of Writ of Error.

To Honorable Edward Douglass White, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pacific Gas and Electric Company respectfully shows as follows:

I.

Your petitioner, Pacific Gas and Electric Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business in the City and County of San Francisco, State of California.

2 II.

On the 27th day of September, 1915, the District Court of Appeal of the State of California, in and for the Third Appellate District, in a certain cause numbered on its clerk's register of Original Proceedings Civil No. 1385, wherein said Pacific Gas and Electric Company was petitioner, and the Police Court of the City of Sacramento, State of California, and Hon. J. J. Henderson, Judge thereof, and the Superior Court of the State of California in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge presiding in Department One thereof, were respondents, rendered a final judgment against your petitioner, whereby said District Court of Appeal discharged the writ of certiorari which it had theretofore issued, and thereby sustained as valid the judgment of said Superior Court affirming the judgment of said Police Court imposing a fine of four hundred dollars ($400.00) upon your petitioner for violation of Ordinance No. 95 (Third Series) of the City of Sacramento, in the State of California, which, by its terms, required every person or corporation owning or operating any street railroad upon any of the streets of said City of Sacramento to sprinkle with water, without cost to said city, the surface of the street occupied by such street railroad between the rails and the

tracks and for a sufficient distance beyond the outermost rails thereof so as to effectually lay the dust and prevent the same from arising when the cars are in operation. A true copy of said ordinance is contained in paragraph V of the petition for writ of certiorari which was filed in said District Court of Appeal by your petitioner.

III.

Said District Court of Appeal is the highest court of the State of California in which a decision in said suit could be had, unless the Supreme Court of the State of California, in the exercise
3 of a discretionary power conferred upon it by section 4 of article VI of the constitution of the State of California, ordered that said suit be heard and determined by itself. Within the time allowed therefor by section 4 of article VI of the constitution, that is to say, within thirty (30) days after the judgment of said District Court of Appeal became final therein, your petitioner applied to the Supreme Court of the State of California for an order that said suit be heard and determined by the last mentioned Court; and the Supreme Court of the State of California, thereafter and within the time allowed by said section 4 of article VI, denied your petitioner's application and refused to make an order that said suit be heard and determined by it. Upon the making of said order by the Supreme Court of the State of California the aforesaid judgment of said District Court of Appeal became final.

IV.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under section 237 of the Judicial Code of the United States, upon the ground that your petitioner in its petition to said District Court of Appeal for writ of certiorari specially set up and claimed that the judgment of said Police Court convicting your petitioner of the misdemeanor of violating the aforesaid ordinance and the judgment of said Superior Court affirming said judgment of the Police Court, were, and each of them was, void and in excess of the jurisdiction possessed by those Courts respectively because the acts for the commission of which your petitioner was convicted and sentenced did not constitute a public offense for the following reasons, viz:
4 (*a*) Said ordinance impairs the obligation of certain contracts referred to in said petition existing between your petitioner and said City of Sacramento under and by virtue of which your petitioner owns and operates its street railway system in said City of Sacramento and is therefore repugnant to section 10 of article I of the Constitution of the United States of America, which declares that no state shall pass any law impairing the obligation of contracts;

(*b*) Said ordinance denies to your petitioner the equal protec-

tion of the laws in violation of section 1 of article XIV of Amendments to the Constitution of the United States, which declares, among other things, that no state shall deny to any person within its jurisdiction the equal protection of the laws; and

(c) Said ordinance, if enforced, will deprive your petitioner of its property without due process of law in violation of section 1 of article XIV of the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law; and

that said judgment of said District Court of Appeal, discharging the writ of certiorari which it had issued upon said petition and sustaining the validity of the aforesaid judgments of said Police Court and said Superior Court, sustained the validity of said ordinance and decided that said ordinance was not repugnant to the Constitution of the United States.

V.

The facts hereinbefore set forth more fully appear by the record of the proceedings in said suit in said District Court of Appeal which is herewith submitted for your consideration.

5 Wherefore your petitioner prays for the allowance of a writ of error returnable into the Supreme Court of the United States and for the issuance of a citation to the above named defendants in error, and for such other and further relief as may be proper in the premises.

PACIFIC GAS AND ELECTRIC COMPANY,
By JOHN A. BRITTON,
Its Vice-President.

[Seal of Pacific Gas and Electric Company, San Francisco, Cal., incorporated October 10th, 1905.]

Attest:

L. H. FOOTE,
Its Secretary.

WM. B. BOSLEY,
Attorney for Petitioner.

Let the writ of error issue as prayed.

In Witness Whereof I have hereunto set my hand this 5th day of April, A. D. 1917, at Sacramento, California, and have caused my signature to be attested by the seal and the signature of the

Clerk of the District Court of Appeal of the State of California, in and for the Third Appellate District.

N. P. CHIPMAN,
Presiding Justice of the District Court of Appeal of the State of California, in and for the Third Appellate District.

[Seal District Court of Appeal, State of California, Third Appellate District.]

Attest:

JOHN T. STAFFORD,
Clerk of the District Court of Appeal of the State of California in and for the Third Appellate District.

6 [Endorsed:] In the Supreme Court of the United States. Pacific Gas and Electric Company, a Corporation, Plaintiff in Error, vs. Police Court of the City of Sacramento et al., Defendants in Error. Petition for Allowance of Writ of Error. Received April 5th, 1917. John T. Stafford, Clerk, District Court of Appeal, Third Appellate District. Wm. B. Bosley, attorney for Plaintiff in Error, 445 Suter Street, San Francisco, California.

7 In the Supreme Court of the United States.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Plaintiff in Error,

vs.

POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and Hon. J. J. Henderson, Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge Presiding in Department One Thereof, Defendants in Error.

Assignment of Errors and Prayer for Reversal.

Now comes Pacific Gas and Electric Company, plaintiff in error herein, and respectfully shows that the final judgment of the District Court of Appeal of the State of California, in and for the Third Appellate District, which was made and entered on or about the 27th day of September, 1915, in that certain suit wherein plaintiff in error was petitioner and defendants in error were respondents, and which was numbered on the Clerk's Register of Original Proceedings in said Court Civil No. 1385, is manifestly erroneous and assigns errors as follows, viz:

I.

8 Said District Court of Appeal erred in rendering and entering judgment on the pleadings in the aforesaid suit in favor of defendants in error and against plaintiff in error herein, discharging and denying the writ of certiorari prayed for in the petition filed therein by plaintiff in error, for the following reasons, viz:

(*a*) The judgment of defendant in error Police Court, which is set forth in paragraph X of said petition, was and is void, and said Police Court, in making and entering the same, exceeded its jurisdiction, because the acts with the commission of which plaintiff in error was charged in the complaint filed in said Police Court, as set forth in paragraph VI of said petition, did not and do not constitute a public offence, for the reason that the ordinance with the violation of which plaintiff in error was charged, to-wit Ordinance No. 95 (Third Series) of the City of Sacramento, State of California, enacted under and pursuant to authority conferred on said city by the constitution of the State of California and the charter of said city adopted by said city and approved by the legislature of said state pursuant to said constitution, was and is repugnant to that provision of section 10, of article I of the Constitution of the United States of America which declares that no state shall pass any law impairing the obligation of contracts, and repugnant to those provisions of section 1 of article XIV of Amendments to the Constitution of the United
9 States of America which declare that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and therefore was and is void and of no effect;

(*b*) The judgment of defendant in error Superior Court, which is set forth in paragraph XII of said petition and which affirmed the aforesaid judgment of said Police Court, was and is void and said Superior Court, in making and entering the same, exceeded its jurisdiction because the acts with the commission of which plaintiff in error was charged in the complaint filed in said Police Court as aforesaid and for which it was convicted by said Police Court and fined the sum of four hundred dollars ($400.00), did not and do not constitute a public offense, for the reason that the ordinance with the violation of which plaintiff in error was charged, to-wit Ordinance No. 95 (Third Series) of the City of Sacramento, State of California, enacted under and pursuant to authority conferred on said city by the constitution of the State of California and the charter of said city adopted by said city and approved by the legislature of said state pursuant to said constitution, was and is repugnant to that provision of section 10 of article I of the Constitution of the United States of America which declares that no state shall pass any law impairing the obligation of contracts, and repugnant to those provisions of section 1 of article XIV of Amendments to the Constitution of
10 the United States of America which declare that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and therefore was and is void and of no effect.

II.

Said District Court of Appeal erred in rendering and entering judgment on the pleadings in favor of defendants in error and against plaintiff in error herein discharging and denying the writ of certiorari prayed for in said petition, because in so doing it decided in favor of the validity of the aforesaid Ordinance No. 95 (Third Series) of said City of Sacramento, a true copy whereof is set forth in paragraph V of said petition, notwithstanding the fact that said Ordinance is, and was specially claimed by plaintiff in error in its said petition to be repugnant to that provision of section 10 of article I of the Constitution of the United States of America which declares that no state shall pass any law impairing the obligation of contracts, and repugnant to those provisions of section 1 of article XIV of Amendments to the Constitution of the United States of America which declare that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and therefore was and is void and of no effect.

Plaintiff in error, basing its prayer upon the errors hereinbefore assigned, prays for a reversal of the judgment of said District Court of Appeal which was entered by it in the aforesaid suit on or
11 about the 27th day of September, 1915, and for a reversal of the judgments which were entered in said Police Court and said Superior Court respectively as set forth in paragraphs numbered X and XII of the petition which was filed by plaintiff in error in said District Court of Appeal as aforesaid.

WM. B. BOSLEY,
Attorney for Pacific Gas and Electric Company, Plaintiff in Error.

12 {Endorsed:} In the Supreme Court of the United States. Pacific Gas and Electric Company, a Corporation, Plaintiff in Error, vs. Police Court of the City of Sacramento, et al., Defendants in Error. Assignment of Errors and prayer for reversal. Received April 5th, 1917. John T. Stafford, Clerk, *Clerk*, District Court of Appeal, Third Appellate District. Wm. B. Bosley, Attorney for Plaintiff in Error, 445 Sutter Street, San Francisco, California.

13 In the Supreme Court of the United States.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Plaintiff in Error,

vs.

POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and Hon. J. J. Henderson, Judge Thereof, and the Superior Court of the State of California, in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge Presiding in Department One Thereof, Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Justices of the District Court of Appeal of the State of California, in and for the Third Appellate District, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of Appeal of the State of Califorina, in and for the Third Appellate District, before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit
14 between Pacific Gas and Electric Company, a corporation, Petitioner therein, and Police Court of the City of Sacramento, State of California, and Hon. J. J. Henderson, the Judge thereof, and the Superior Court of the State of California, in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge presiding in Department One thereof, Respondents therein, and numbered on the Clerk's Register of Original Proceedings in said Court Civil No. 1385, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Pacific Gas and Electric Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with
15 all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the

same at Washington, on the 4th day of June, 1917, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 5th day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the District Court of the United States in and for the Northern District of California, Second Division.
By THOMAS J. FRANKLIN,
Deputy Clerk.

Allowed this 5th day of April, 1917.

N. P. CHIPMAN,
Presiding Justice of the District Court of Appeal of the State of California, in and for the Third Appellate District.

16 [Endorsed:] In the Supreme Court of the United States. Pacific Gas and Electric Company, a Corporation, Plaintiff in Error, vs. Police Court of the City of Sacramento et al., Defendants in Error. Writ of Error. Received April 5th, 1917. John T. Stafford, Clerk, District Court of Appeal, Third Appellate District. Wm. B. Bosley, Attorney for Plaintiff in Error, 445 Sutter Street, San Francisco, California.

17 In the Supreme Court of the United States.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Plaintiff in Error,

vs.

POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and Hon. J. J. Henderson, Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge Presiding in Department One Thereof, Defendants in Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Police Court of the City of Sacramento, State of California, and Hon. J. J. Henderson, Judge Thereof, and the Superior Court of the State of California, in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge Presiding in Department One Thereof, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of Appeal of the State of
18 California, in and for the Third Appellate District, wherein Pacific Gas and Electric Company, a corporation, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable N. P. Chipman, presiding Justice of the District Court of Appeal of the State of California, in and for the Third Appellate District, this 5th day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal District Court of Appeal, State of California, Third Appellate District.]

N. P. CHIPMAN,
Presiding Justice of Said District Court of Appeal.

Attest:
JOHN T. STAFFORD,
Clerk of Said District Court of Appeal.

Receipt of a copy of the above and foregoing Citation is hereby admitted this 5th day of April, 1917.

HUGH B. BRADFORD
ARCHIBALD YELL,
Attorneys for Defendants in Error.

19 [Endorsed:] In the Supreme Court of the United States. Pacific Gas and Electric Company, a Corporation, Plaintiff in Error, vs. Police Court of the City of Sacramento et al., Defendants in Error. Citation. Received April 5th, 1917. John T. Stafford, Clerk, District Court of Appeal, Third Appellate District. Wm. B. Bosley, Attorney for Plaintiff in Error, 115 Sutter Street, San Francisco, California.

20 Approved.

N. P. CHIPMAN,
Presiding Justice Dist. Court of Appeal for the Third District, State of California.

April 5, 1917.

In the Supreme Court of the United States.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Plaintiff in Error,

vs.

POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and Hon. J. J. Henderson, Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and Hon. Malcolm C. Glenn, the Judge Presiding in Department One Thereof, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents that Pacific Gas and Electric Company, a corporation organized under and by virtue of the laws of the State of California and plaintiff in error in the above entitled suit, as Principal, and Fidelity and Deposit Company of Maryland, a corporation organized under and by virtue of the laws of the State of Maryland, as Surety, are held and firmly bound unto Police Court of the City of Sacramento, State of California, and Hon. J. J. Henderson, Judge thereof, and unto the Superior Court of the State of California, in and for the County of Sacramento and Hon.
21 Malcolm C. Glenn, the Judge presiding in Department One thereof, defendants in error in the above entitled suit, in the sum of one thousand dollars ($1,000.00) well and truly to be paid to said obligees, their successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents:

The condition of the above bond is such that whereas the above named plaintiff in error is about to apply for and prosecute a writ of error in the Supreme Court of the United States to reverse the judgment which was rendered by the District Court of Appeal of the State of California, in and for the Third Appellate District, on or about

the 27th day of September, 1915, against said plaintiff in error and in favor of said defendants in error;

Now, therefore, if said plaintiff in error shall prosecute its said writ of error to effect, and, if it shall fail to make its prayer good, shall answer all damages and costs, then this obligation shall be void, but otherwise shall remain in full force and effect.

In witness whereof, on this 4th day of April, 1917, said Principal and said Surety have hereunto caused their respective corporate names to be subscribed and their respective corporate seals to be affixed by their respective officers thereunto duly authorized by their respective boards of directors.

[CORPORATE SEAL.]

PACIFIC GAS AND ELECTRIC COMPANY,
By JOHN A. BRITTON, *Its Vice-President*, and
By D. H. FOOTE, *Its Secretary*.

[CORPORATE SEAL.]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By C. K. BENNETT, *Its* ——, and
By EDWIN C. PORTER, *Its Secretary*.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 4th day of April in the year One Thousand Nine Hundred and Seventeen, before me, R. J. Cantrell, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared C. K. Bennett and W. Edwin C. Porter known to me to be the Attorney-in-fact and Agent, respectively, of Fidelity and *of* Deposit Company of Maryland, the Corporation that executed the within and foregoing instrument, and to be the officers who executed the said instrument on behalf of said Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[SEAL.] R. J. CANTRELL,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 4th day of April in the year One Thousand Nine Hundred and Seventeen, before me, R. J. Cantrell, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared John A. Britton and D. H. Foote known to me to be the Vice President & General

Manager and Secretary, respectively, of Pacific Gas and Electric Company, the Corporation that executed the within and foregoing instrument, and to be the officers who executed the said instrument on behalf of said Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[SEAL.] R. J. CANTRELL,
Notary Public in and for the City and County of San Francisco, State of California.

22 I, John T. Stafford, Clerk of the District court of Appeal in and for the Third Appellate District of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Bond on Writ of Error filed April 5, 1917, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 7th day of April, A. D. 1917.

[Seal District Court of Appeals, State of California, Third Appellate District.]

JOHN T. STAFFORD,
Clerk.

By CAVINS HART,
Deputy.

23 [Endorsed:] In the Supreme Court of the United States Pacific Gas and Electric Company, a Corporation, Plaintiff in Error, vs. Police Court of the City of Sacramento, et al., Defendants in Error. Copy. Bond on Writ of Error. Received April 5th, 1917. John T. Stafford, Clerk, District Court of Appeal, Third Appellate District. Wm. B. Bosley, Attorney for Plaintiff in Error, 445 Sutter Street, San Francisco, California.

24 In the District Court of Appeal, State of California, Third Appellate District.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and the Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and the Judge Presiding in Department One Thereof, Respondents.

To the Honorable the District Court of Appeal of the Third Appellate District:

The petition of the Pacific Gas and Electric Company, a corporation, respectfully shows as follows:

I.

That petitioner is a corporation organized and existing as a public utility corporation under the laws of the State of California, and owns and operates a street railway system in the City of Sacramento, and for more than five years last past petitioner has owned and operated said street railway system.

II.

That said City of Sacramento is a municipal corporation existing under and governed by a freeholders' charter, which was adopted by the electors of said city at an election held on November 7, 1911, and approved by the Legislature of the State of California by concurrent resolution duly adopted on or about December 20, 1911. (Statutes of California, Extra session, 1911, page 305.)

That prior to the adoption of said freeholders' charter the said City of Sacramento had existed under and been governed by the terms and conditions respectively of two separate and distinct charters, the first of which was an act entitled, "An Act to Incorporate the City of Sacramento," approved April 25, 1863 (Statutes of California, 1863, page 415), which was amended by an act entitled, "An Act Supplementary to an Act entitled an Act to Incorporate the City of Sacramento, approved April Twenty-fifth, Eighteen Hundred and Sixty-three," approved April 1, 1872 (Statutes and Amendments, 1871-2, page 860); and a freeholders' charter which was adopted by the electors of the said city in the month of May, 1892, and approved by the Legislature of the State of California, February 7, 1893 (Statutes and Amendments, 1893, page 545).

III.

That petitioner has so owned and operated its said street railway system in the said City of Sacramento under and pursuant to certain franchises granted to it or its predecessors by said City of Sacramento or by the Board of Supervisors of the County of Sacramento respectively at different times between the 1st day of April, 1887, and the 16th day of October, 1911, and under the provisions of Title IV of Part IV of the Civil Code of the State of California.

That in none of said franchises under which petitioner maintains and operates its said street railway system, whether granted by said City of Sacramento or by the Board of Supervisors of said County of Sacramento, is there any provision or reservation empowering the governing body granting the same to require petitioner or any of its predecessors to sprinkle any portion of any of the streets occupied by its street railway tracks, or to sprinkle any street or highway of said city or of said county under any circumstances whatsoever; and that in none of said charters of said City of Sacramento, or in the Civil Code, was or is there any provision authorizing the said City of Sacramento, by ordinance or otherwise, to re-

quire petitioner or any of its predecessors to sprinkle any
26 portion of any of the streets occupied by its street railway tracks, or to sprinkle any street or highway of said city under any circumstance whatsoever.

IV.

The cars used in the operation of petitioner's street railway are run on fixed metal tracks which are placed on and along the center of the respective streets occupied thereby, there being approximately sixteen miles of double track and eight miles of single track.

Under the provisions of the Civil Code of the State of California and the above mentioned franchises, petitioner is required to pave and keep in repair that portion of the street lying between the rails of its street railway tracks and for two feet on each side thereof, and also between the tracks where there are double tracks. Petitioner is thus required to pave and keep in repair, and has paved and does keep in repair a strip nine and one-half feet wide throughout the entire length of each street occupied by its single tracks, and twenty feet and one-half inch throughout the entire length of each street occupied by its double tracks. The streets so occupied by petitioner's street railway tracks are about forty-eight (48) feet in width between the curb lines.

For each of the years from 1908 to 1912 inclusive, under a contract with the City of Sacramento therefor, petitioner sprinkled the streets occupied by its street railway tracks and received as compensation for such services under said contract an average of $1,905.00 for each of said years. The money thus paid petitioner for the doing of such services was raised by general taxation. The streets so watered by petitioner under such contract with the city and for which it received the aforesaid sum each year, are the same streets which it is sought by the hereinafter mentioned ordinance to require petitioner to keep sprinkled without cost to the city, thus shifting on to petitioner the burden heretofore borne by the city.

27 During each of the years above mentioned, the City of Sacramento, in addition to the money so raised by general taxation and paid to petitioner for sprinkling the streets under the contract aforesaid, raised funds by that method and devoted same to sprinkling of its streets other than those so sprinkled by petitioner; and since that time, i. e., during the years 1913-14, has raised money by general taxation and used same for sprinkling all of its streets that have been sprinkled during that time, including those theretofore sprinkled by petitioner under the aforesaid contract.

V.

Notwithstanding the absence of any reservation or provision in said franchises or charters authorizing it, the City of Sacramento, on the 19th day of June, 1913, passed and adopted an ordinance

which is denominated "Ordinance No. 95, Third Series, and, omitting its title, is as follows, to-wit:

"Be it ordained by the City Commission of the City of Sacramento as follows:

Section 1. Every person, firm, or corporation owning, controlling or operating any street railroad, suburban railroad, or interurban railroad upon and along any of the streets of the City of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and the tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation.

Section 2. The sprinkling required by the provisions of Section 1 of this ordinance shall be done under the general supervision of the Superintendent of Streets, and such work shall be performed only between the hours of nine (9) o'clock P. M. and seven (7) o'clock A. M., unless otherwise directed by said Superintendent of Streets. The water used for sprinkling said streets may be taken from the city water system without charge; provided, that great care must be exercised in coupling hose to the hydrants so that injury to the same may be avoided; and provided also, that when a fire alarm is sounded all hydrants must be instantly closed and must not be reopened until the signal indicating that the fire has been extinguished is given.

Section 3. In the sprinkling of the streets, as required by this ordinance, oil macadam streets and streets paved with asphalt shall be lightly sprinkled, but all other streets shall be thoroughly wet.

Section 4. A violation of any of the provisions of this ordinance shall be and constitute a misdemeanor and shall be punishable by a fine of not to exceed five hundred ($500.00) dollars, or by imprisonment in the city jail for not to exceed six months, and for each day any such person, firm or corporation shall fail, refuse or neglect to sprinkle such streets, as in this ordinance provided, such person, firm or corporation must pay to the City of Sacramento as liquidated damages the sum of two ($2.00) dollars for each mile of street so left unsprinkled.

Section 5. This is an ordinance for the immediate preservation of the public health, and is hereby declared to be an urgency measure and shall be in full force and effect from and after its passage.

Passed, June 19, 1913.

M. J. BURKE,
President of City Commission.

Attest:

M. J. DESMOND,
City Clerk."

V (*a*).

The ordinance thus attempts to require petitioner, at its own expense during the months of June, July, August, September and October of each year, to sprinkle so much of the streets occupied by its tracks as may be necessary effectually to lay the dust thereon and prevent the same from rising when petitioner's cars are in operation.

To leave any portion of such streets in such condition that dust therefrom would arise when the cars are in operation would, by the provisions of the ordinance, subject petitioner to a prosecution and fine therefor.

In order thus to keep the streets so wetted that no dust will arise therefrom when the cars are operated thereon, especially where it is as hot and dry as in Sacramento during the months thus designated, it would be necessary to keep a sprinkler going practically all of the time, especially during the day. Yet the ordinance provides (Section 2) that the sprinkling required shall be done only between the hours of nine o'clock P. M. and seven o'clock A. M.—unless the Superintendent of the Streets shall direct otherwise. In other words, in order to avoid a violation of the express provisions of the ordinance, that is, to keep the dust so wetted down that it will not rise when the cars are in operation, petitioner must either spill enough water thereon during the hours thus designated
29 to last all of the next day, or secure permission from the Superintendent of the Streets to sprinkle during the day.

V (*b*).

Petitioner offered evidence at the trial in the police court to prove the amount of expense that would necessarily be incurred by petitioner should it comply with said ordinance, but the court, on objection of the People, refused to admit such evidence.

To comply with the provisions of said ordinance requiring the sprinkling therein designated to be done between the hours of nine o'clock P. M. and seven o'clock A. M. of each night during the months that such sprinkling would be necessary would necessitate the expenditure by petitioner of from $2,200.00 to $3,000.00 per year, and to comply with the provisions of the ordinance so as effectually to keep the dust from arising when petitioner's cars would be in operation, which would require more or less sprinkling in the day, would increase such amount to a considerable extent.

VI.

That petitioner, being advised and believing that said ordinance was of no legal effect, and had no legal application to petitioner or to any part of its street railway system, failed and refused to obey the terms thereof or any part thereof.

That thereafter, and on the 19th day of July, 1913, there was filed in the Police Court of the City of Sacramento, County of Sacra-

mento, State of California, respondent herein, before the Honorable Thomas H. Christiansen, then presiding judge of said court, a sworn complaint signed by one F. G. Wrightson in words and figures following:

(Title of Court and Cause.)

"The People of the State of California, upon oath of F. G. Wrightson, complain against the defendant, Pacific Gas and Electric Company, a corporation, for the crime of misdemeanor, to-wit: Violating Ordinance No. 95, Third Series, of said City of Sacramento, committed as follows:

That the said defendant, Pacific Gas and Electric Company is, and during all the times in this complaint mentioned has been a corporation duly organized and existing and doing business under and by virtue of the laws of the State of California;

That at all the times in this complaint mentioned, the said defendant corporation owned, operated and controlled a street railroad upon and along and occupying certain streets of the City of Sacramento; that on the — day of July, 1913, and within the limits of the City of Sacramento, in the County of Sacramento, in the said State of California, the said defendant, Pacific Gas and Electric Company, a corporation as aforesaid, did then and there, before the filing of this complaint, and within one year prior thereto, willfully, and unlawfully fail, neglect and refuse to sprinkle with water the surface of the street or streets occupied by such corporation, at such times as were necessary to keep the dust laid, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars owned, operated and controlled by said defendant corporation upon and over the said street railroad of the said defendant corporation aforesaid, were in operation; which said failure, neglect and refusal of the said defendant corporation aforesaid was and is contrary to and in violation of lawful ordinance of the City of Sacramento, entitled: 'Ordinance No. 95, Third Series, An Ordinance providing for the sprinkling of streets occupied by street railways, suburban railways or interurban railways, within the City of Sacramento,' etc., passed by the City Commission of said City of Sacramento on the 19th day of June, A. D. 1913; and contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of California.

F. G. WRIGHTSON.

Sworn to and subscribed before me, at the City of Sacramento, the 19th day of July, A. D. 1913.

[SEAL.] THOMAS H. CHRISTIANSEN,
Judge of the Police Court in and for said City of Sacramento."

VII.

That upon the filing of said complaint by said Wrightson, said Thomas H. Christiansen, as Judge of said Police Court, issued a summons in the name of the People of the State of California to petitioner in the words and figures following, except as to title of court and cause:

"(Court and Cause.)

STATE OF CALIFORNIA,
County of Sacramento, ss:

The People of the State of California to Pacific Gas and Electric Company (a Corporation), Greeting:

You are hereby summoned to appear before me at the
31 court room of the Police Court of the City of Sacramento, County of Sacramento, State of California, at Number 608 I Street, in the said City of Sacramento on Saturday, the 26th day of July, A. D. 1913, at the hour of 10:00 o'clock in the morning of said day, to answer a charge made against you upon the information of F. G. Wrightson for wilfully and unlawfully failing, neglecting and refusing to sprinkle with water the surface of the street or streets occupied by the railroad tracks used in the operation of the street railway owned, operated and controlled by you upon and along the streets of the City of Sacramento, in violation of Ordinance Number 95, Third Series, of the said City of Sacramento, entitled,

'An Ordinance providing for the sprinkling of streets occupied by street railways, suburban railways, or interurban railways, within the City of Sacramento, regulating the manner in which the same shall be done; providing a penalty for the violation of said ordinance, and declaring the same to be a matter of urgency.'

Dated at the City of Sacramento, this 19th day of July, A. D. 1913.

THOMAS H. CHRISTIANSEN,
Judge of the Police Court in and for the City of Sacramento."

That said summons was on the 19th day of July, 1913, served upon petitioner.

VIII.

That on the 26th day of July, 1913, petitioner appeared in said Police Court and filed therein a demurrer in words and figures following, except as to title of court and cause:

"(Court and Cause.)

Now comes Pacific Gas and Electric Company, a corporation, by attorney, and demur- to the complaint herein upon the following grounds, to-wit:

I.

That more than one offense is charged.

II.

That the facts stated do not constitute a public offense.

III.

That the complaint filed herein does not state facts sufficient to constitute a public offense, in that the provisions of Ordinance Number 95, Third Series, of the City of Sacramento, entitled,

'An Ordinance providing for the sprinkling of streets occupied by street railways, suburban railways, or interurban railways, within the City of Sacramento, regulating the manner in which the same shall be done; providing for punishment for the violation of said ordinance, and declaring the same to be a matter of urgency' is in violation of Article I, Section 13, of the Constitution of the State of California, providing that no person shall be deprived of life, liberty or property without due process of law, and said ordinance and the means for carrying the same out do not constitute
32 due process of law.

IV.

That the Ordinance described in the complaint is inconsistent with the provisions of the 'Public Utilities Act' of the State of California, and void.

PACIFIC GAS AND ELECTRIC COMPANY, *Defendant*,
By L. T. HATFIELD, *Attorney*.

WM. B. BOSLEY,
Of Counsel."

IX.

That at the time of filing said demurrer petitioner filed in said court an answer, a copy of which is hereto attached, marked "Exhibit A" and made a part hereof, wherein, among other things, the following objections were made in addition to those contained in said demurrer:

(*a*) That the police court was without jurisdiction to hear and determine the matters involved and described in the summons and complaint in that behalf;

(*b*) That said ordinance seeks to impose a burden or charge upon petitioner in the nature of a tax, contrary to the provisions of Section 14 of Article XIII of the Constitution of the State of California;

(*c*) That said ordinance denies to petitioner and others in like situation the equal protection of the law, contrary to the provisions

of the Fourteenth Amendment to the Constitution of the United States;

(*d*) That said ordinance is repugnant to the provisions of Section 14 of Article I of the Constitution of the State of California in that, if enforced, it will result in the taking of petitioner's property for a public use without just compensation;

(*e*) That said ordinance impairs the obligation of the contracts now existing between petitioner and the said City of Sacra-
33 mento, under and by virtue of which petitioner owns and operates its railway system in said city as aforesaid, and is therefore repugnant to Section 16 of Article I of the Constitution of the State of California and Section 10 of Article I of the Constitution of the United States;

(*f*) That said ordinance is inconsistent with the general laws of the State of California;

(*g*) The burden sought to be imposed upon petitioner by said ordinance is unreasonable and oppressive and, if enforced, will deprive petitioner of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and Section 13 of Article I of the Constitution of the State of California.

X.

That thereafter on the 3d day of September, 1913, said complaint came on for hearing in said police court and petitioner then urged the above objections.

That, notwithstanding such objections, the said police court proceeded with the said hearing, reserving the announcement of its judgment until the 8th day of September, 1913.

That thereafter on the 8th day of September, 1913, said police court announced its judgment in the words and figures following:

(Title of Court and Cause.)

Monday, September 8, 1913.

"The above entitled matter having been heretofore heard and taken under advisement by the court until this Monday, September 8th, 1913, at four o'clock P. M., L. T. Hatfield, counsel for the defendant corporation, and the acting City Attorney, S. W. Cross, and special counsel, V. A. McGeorge, on behalf of the People, appearing in court and the court being fully advised, the court adjudged the defendant corporation guilty as charged.

Thereupon counsel for said defendant corporation moved the court for a new trial and also for the arrest of judgment herein; said respective motions were denied by the court.

34 At the time of conviction the defendant corporation waived the postponement of time for rendering judgment and was informed by the court of the nature of the charge against it, and of its plea and waiver of trial by jury, and of its conviction, and

was asked by the court any legal cause to show why judgment should not be pronounced against it, and no sufficient cause being alleged or appearing to the court;

It is therefore ordered by the court that the aforesaid Pacific Gas and Electric Company, an electric corporation, be and it is fined in the sum of four hundred ($400.00) dollars."

XI.

That thereafter on the 10th day of September, 1913, being so advised, petitioner appealed to the Superior Court of the County of Sacramento from said judgment of said police court.

XII.

That thereafter on the 8th day of December, 1913, said appeal came regularly on for hearing, in said superior court, in Department One thereof, wherein the late, the Honorable J. W. Hughes then presided; that at said hearing the defendant, the petitioner herein, duly raised and urged the above-mentioned objections.

That thereafter said superior court rendered its judgment, which is in words and figures as follows:

(Title of Court and Cause.)

"The transcript on appeal in the above entitled cause came on regularly this day to be heard. L. T. Hatfield and W. B. Bosley appeared as counsel on behalf of defendant and appellant; also appeared Assistant District Attorney, S. S. Atkinson, and F. A. McGeorge on behalf of the People, respondents. Whereupon said transcript was argued by counsel for the respective parties and submitted to the court, and all and singular the law and the premises having been fully considered and the court being now fully advised, it is ordered, adjudged and decreed that the judgment rendered on the 8th day of September, 1913, in the Police Court of the City of Sacramento, County of Sacramento, State of California, whereby said appellant was convicted of the crime of violating ordinance 95, Third Series of the City of Sacramento, and sentenced to pay a fine in the sum of four hundred ($400.00) dollars, be and the same is hereby affirmed.

J. W. HUGHES,
Judge of the Superior Court."

35 Said judgment was thereafter duly entered in the records of said superior court and a copy sent to and filed in said police court, and the same now exists and is not reversed, vacated, set aside, or satisfied in whole or in part.

XIII.

Being advised and believing that the judgment of said superior court, and the ordinance and proceedings upon which it was

grounded, involved the legality of a municipal fine, petitioner thereafter and in due time initiated and perfected an appeal therefrom to the supreme court of this state, which court on October 3, 1914, dismissed said appeal on the ground that no appeal lay from such judgment. (See People v. Pacific G. & E. Co., 143 Pac. 727.)

XIV.

Petitioner has no appeal from said judgment of said superior court, nor any plain, speedy or adequate remedy.

XV.

The police court in making and entering the aforesaid judgment convicting petitioner of the crime of violating the aforesaid ordinance, and the superior court in making and entering its said judgment affirming said judgment of said police court, each exceeded its jurisdiction for the following reasons:

1. The facts stated in the aforesaid complaint, on which each of the aforesaid judgments was based, do not constitute a public offense.

2. The said ordinance, with the violation of which petitioner stands charged in said complaint, is void and of no effect in that,

(*a*) Said ordinance in effect imposes a burden or charge upon petitioner in the nature of a tax, contrary to the provisions of Section 11 of Article XIII of the Constitution of the State of California;

36 (*b*) Said ordinance denies to petitioner and others in like situation the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States;

(*c*) Said ordinance is repugnant to the provisions of Section 14 of Article I of the Constitution of the State of California in that, if enforced, it will result in the taking of petitioner's property for a public use without just compensation;

(*d*) Said ordinance impairs the obligation of the contracts now existing between petitioner and the said City of Sacramento, under and by virtue of which petitioner owns and operates its railway system in said city as aforesaid, and is therefore repugnant to Section 16 of Article I of the Constitution of the State of California and Section 10 of Article I of the Constitution of the United States;

(*e*) The burden sought to be imposed upon petitioner by said ordinance is unreasonable and oppressive and, if enforced, will deprive petitioner of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and Section 13 of Article I of the Constitution of the State of California;

(*f*) Said ordinance is inconsistent with the general laws of the State of California.

Wherefore petitioner prays that the said police court and the said superior court each be required to certify to this court for

review herein, at a specified time and place, a transcript of the record including all proceedings and testimony given and stipulations entered into at the trial and hearings respectively had before said courts, and that thereupon this court review said judgments and annul the same; and also that all proceedings under said
37 judgments be stayed in the meantime.

WM. B. BOSLEY,
THOS. J. STRAUB,
Attorneys for Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John A. Britton, being duly sworn, says that he is the Vice President and General Manager of the Pacific Gas and Electric Company, petitioner above named; that he has read the foregoing Petition of Writ of Certiorari and knows the contents thereof, and the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

JOHN A. BRITTON.

Subscribed and sworn to before me this 26th day of February, 1915.

[NOTARIAL SEAL.] R. J. CANTRELL,
Notary Public in and for the City and County of San Francisco, State of California.

38 "EXHIBIT A."

In the Police Court of the City of Sacramento, County of Sacramento, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Defendant.

Now comes Pacific Gas and Electric Company, by attorney, and for answer to the summons and complaint in the above entitled action, states:

I.

That this court is without jurisdiction to hear or determine the matters involved in, and described in the summons and complaint in that behalf.

II.

That the facts stated in the summons and complaint do not constitute a public offense.

III.

That this defendant is now, and for more than ten years last past by its predecessors and itself has been the owner of, and engaged in the operation of a street railway system in the City of Sacramento under franchises granted by the lawful authority of said city in that behalf, and by certain franchises granted by the Board of Supervisors of the County of Sacramento for such purposes.

39

IV.

That such street railway system is at present located entirely within the city limits of the City of Sacramento.

V.

That certain of the franchises hereinafter specified were granted to defendant or its predecessors in interest by the Board of Supervisors of the County of Sacramento, over territory that is now embraced within the limits of said city.

VI.

That a statement of the ordinances creating the respective franchises under which defendant is operating is hereinafter set forth. That the portions of street railway tracks authorized under the respective franchises have been united together by appropriate action and connections, and are operated as one entire system.

VII.

That the franchises granted by the City of Sacramento, under which defendant is so operating its said street railway system are contained in ordinances described as follows:

Ordinance 226, passed September 12, 1887;

Ordinance 230, passed April 2, 1888;

Ordinance 242, passed April 22, 1889, each for the term of fifty years from the passage thereof, cover the constructed and operated line located on 15th Street, between K and M.

Ordinance Number 243, passed April 29, 1889, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on 28th street between J and M.

Ordinance Number 249, passed July 22, 1889, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on J Street, 3d to 28th; 15th, K to M; M, 15th to 28th; 28th, J to Y; and Y, 28th to 31st.

40 Ordinance Number 290, passed December 21, 1891, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on 3d Street, K to P; P Street, 3d to 28th; and 10th, P to Q.

Ordinance Number 296, passed June 27, 1892, for the term of

fifty years from the date of passage thereof, covers the constructed and operated line located on 10th Street, P to Y.

Ordinance Number 301, passed October 3, 1892, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on 7th Street, K to G; and G Street, 7th to 19th.

Ordinance Number 302, passed October 10, 1892, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on 3d Street, J to K; and H Street, 20th to 31st.

Ordinance Number 310, passed February 20, 1893, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on 10th Street, J to K; K Street, 10th to 15th; 15th Street, M to P; 21st Street, P to Y; 19th Street, G to H; and H Street, 19th to 20th.

Ordinance Number 342, passed April 24, 1894, for the term of twenty-five years from the date of passage thereof, covers the constructed and operated line located on J Street, 2d to 3d.

Ordinance Number 645, passed March 14, 1904, for the term of twenty-five years from the date of passage thereof, covers the constructed and operated line located on J Street, 28th to 31st; and 28th Street, J to H.

Ordinance Number 750, passed September 11, 1906, for the term of twenty-five years from the date of passage thereof, covers the constructed and operated line located on T Street, Front to 28th, 3d Street, P to T; 7th Street, K to T; and 15th Street, P to T.

41 Ordinance Number 930, passed March 7, 1910, for the term of twenty-five years from the date of passage thereof, covers the constructed and operated line located on Y Street, 10th to Riverside Road.

Ordinance Number 993, passed October 16, 1911, for the term of twenty-five years from the date of passage thereof, covers the constructed and operated line located on K Street, from 15th to 21st; and on 21st Street, K to P.

Ordinance Number 994, passed October 16, 1911, for the term of twenty-five years from the date of passage thereof, covers the constructed and operated line located on I Street, 2d to 3d; and 3d Street, I to J.

Sacramento County Ordinance Number 78, passed March 10, 1904, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on 21st Street Road, Y to Bonita Avenue; Bonita Avenue, 21st Street Road to 24th Street; 24th Street Road to 2d Avenue, Curtis Oaks; through 2d Avenue of Curtis Oaks and Oak Grove to 35th Street, Oak Park.

Sacramento County Ordinance Number 79, passed March 10, 1904, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on J Street from 31st for a distance of about $1\frac{3}{4}$ miles. The remainder of track in that part of the system being on private right of way acquired before any subdivision.

Sacramento County Ordinance Number 87, passed July 12, 1905, for the term of fifty years from the date of passage thereof, covers the constructed and operated line located on Riverside Road from Y Street for a distance of about two miles.

Sacramento County Ordinance Number 88, passed July 12, 1905, for the term of fifty years from the date of passage thereof,
42 covers the constructed and operated line located on Cypress Avenue, 35th to Upper Stockton Road; and Upper Stockton Road, Cypress Avenue to Magnolia Avenue.

VIII.

That in none of said franchises so enumerated is there any provision or reservation of the right or power of plaintiff requiring defendant or any of its predecessors to sprinkle the streets, avenues and public thoroughfares upon which its said tracks are located and operated.

IX.

That there was not at the time of the granting of any of said franchises, and there is not now any reservation in behalf of the City of Sacramento or of the County of Sacramento or of the State of California of the right or power to require defendant or any other grantee of said franchises or either thereof to sprinkle said streets, avenues or public thoroughfares over which the same is operated, or to sprinkle any portion thereof in any manner whatever.

X.

That there is not now, and never was, delegated to or reserved to the City of Sacramento in any provision or law or the Constitution of the State of California, any right or power to require this defendant to sprinkle said streets, avenues or public thoroughfares upon which its said tracks are located and operated.

XI.

That all cars operated by defendant itself and all cars that have heretofore been operated by defendant and its predecessors in interest have passed over the respective streets, avenues and public thoroughfares upon which the same are located upon fixed metal tracks, upon wheels whose tread respectively does not exceed a width of four inches. That no earth or other material calculated to be
43 reduced to dust is carried onto, over or along said streets, avenues or public thoroughfares or either thereof by the cars of defendant or any thereof, and defendant does not create by any process of treading upon or running over articles of material calculated to create dust, and any and all dust that is on said streets, avenues and public thoroughfares aforesaid is created and placed there by vehicles, animals, persons and other conditions not under the

control or management of defendant, its agents or officers, or any thereof.

XII.

That under each of said franchises described as aforesaid, and under the general laws of the State of California in force at the time of the granting of such franchises respectively, defendant and its predecessors were obligated to pay and be assessed for the cost of improving the portion of the street or streets embraced between the rails of the track or tracks of their railroad or railway, and for two feet on each side thereof, and no other or further obligation in that behalf applies to this defendant or ever did apply to its predecessors in interest in this behalf.

XIII.

That the matter of process of sprinkling the streets, avenues and public thoroughfares as aforesaid is not incident to or a part of the operating of such street railway or any part thereof, and the process or method or act of sprinkling any portion of said streets is not a necessity for the operation and conduct of the business of defendant, but constitutes a service of a public nature for the benefit of and chargeable to the public at large, and is not chargeable to this defendant as a corporation or an individual, or to any other corporation or individual, but is solely a public charge.

44

XIV.

That the existence of dust upon said streets, avenues and public thoroughfares as aforesaid is created, precipitated and circulated by the use of vehicles such as automobiles, carriages, buggies, wagons, trucks, the passage of animals of all kinds, and by the footsteps of persons having occasion to pass over, along and upon said streets, avenues and public thoroughfares as aforesaid, and such dust is caused to rise and permeate the air by the passage of such vehicles over such streets, avenues and public thoroughfares, independent of any act or conduct or movement of the cars or other property of defendant.

XV.

That defendant does not own or control any franchises, and is not operating any property under any franchise of said city or at all granted on or after the 1st day of July, 1912.

XVI.

That under and by virtue of the rights and privileges created and established by the granting and acceptance of the franchises herein enumerated, defendant by itself and its predecessors accepted the terms thereof, constructed the street railway now in existence, and

equipped the same, relying upon the rights and privileges created by such franchises, and under and by the terms thereof, contract relations between the City of Sacramento, the County of Sacramento, and defendant or its predecessors were so created and established prior to the 1st day of July, 1912. That as hereinbefore set forth, none of said rights or privileges provided for or contained any representation of any right or authority on the part of the City of Sacramento, or the County of Sacramento, or the State of California to impose upon the property created and operated under said franchise, any burden or requirement of a financial character that was not then required under such franchise rights and privileges.

45 XVII.

That the charter of the City of Sacramento now in force, constituting the governing authority of said City, does not contain any right or reservation of right, or delegation of power to authorize it to impose upon the property created under and in pursuance of said rights, privileges and franchises granted as above, any additional burden.

XVIII.

That none of the street railway owned, operated and controlled by defendant had any existence or effectiveness at the time of the granting of the respective franchises under which the respective portions of the railroad above described were constructed, but the property now owned, operated and controlled by defendant in that behalf was wholly and completely created, established and made available from sources other than any public fund or public obligation in that behalf, the said franchises so granted being intangible and creative of the right to do and perform certain acts, and did not embrace any tangible property of any character whatever.

XIX.

That in the granting of the franchises hereinbefore set forth, each were for a valuable consideration which has been duly rendered to said City of Sacramento and the County of Sacramento, and in no event were any of said franchises granted to defendant or its predecessors as a gratuity.

XX.

That defendant is a public utility within the terms and conditions of the "Public Utilities Act," approved November 23, 1911, and is exempt from the control of the provisions provided by the ordinance upon which the complaint in this case is based.

46 XXI.

That the ordinance under consideration is unreasonable, and when enforced will deprive defendant of its property without due process

of law, and is contrary to the provisions of Amendment XIV to the Constitution of the United States.

XXII.

The terms and conditions of the ordinance upon which this prosecution is based denies full protection of the law to this defendant, and is inconsistent with the general law of the State of California governing such matters, which said general law was in force prior to the adoption of such ordinance.

XXIII.

Said ordinance imposes upon the property and rights of defendant a burden of a public character in the nature of a special tax against the property of defendant, to provide the money to defray the expense of sprinkling the streets as provided therein, and is contrary to the provisions of Section 16, Article I, and is contrary to the provisions of Section 1, Article XIII of the Constitution of the State of California.

XXIV.

That the enforcement of such ordinance will create by indirection a tax in the nature of a revenue for the benefit of the City of Sacramento, which could not be levied upon the property of defendant by any direct process, and is contrary to the provisions of Section 1, Article XIII of the Constitution of the State of California.

XXV.

That by reason of all the facts and circumstances detailed herein, and by reason of the law and constitutional provisions in that behalf, defendant denies that it is subject to the requirements
47 of the ordinance described in the complaint and summons herein.

Wherefore, having fully answered the summons and complaint in this behalf, defendant asks to be discharged.

PACIFIC GAS AND ELECTRIC COMPANY, *Defendant*,
By L. T. HATFIELD,
Attorney for Defendant.

WM. B. BOSLEY,
Of Counsel.

(Endorsed:) 1385. In the District Court of Appeal, State of California. Third Appellate District. Pacific Gas and Electric Company, a corporation, Petitioner, vs. The Police Court of the City of Sacramento, et al., Respondents. Petition for Writ of Certiorari. Filed Mar. 2, 1915. John T. Stafford, Clerk. By Cavins Hart, Deputy. Wm. B. Bosley, Thos. J. Straub and L. T. Hatfield, Attorneys for Petitioner, 445 Sutter Street, San Francisco, California.

48 In the District Court of Appeal of the State of California, Third Appellate District.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and the Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and the Judge Presiding in Department One Thereof.

Order for Writ of Certiorari.

Upon filing and reading the petition of Pacific Gas and Electric Company for a Writ of Certiorari:

It is ordered:

That a Writ of Certiorari issue as therein prayed for, returnable on the 9th day of March, 1915, at the hour of 10 o'clock A. M.

Done this 2d day of March, 1915.

By the Court:

CHIPMAN,
Presiding Justice.

49 [Endorsed:] District Court of Appeal, Third Appellate District. No. 1385. Pacific Gas and Electric Co., Petitioner, vs. Police and Superior Courts of Sac. City and County, Resp'ts. Filed Mar. 2, 1915. John T. Stafford, Clerk, By Cavins Hart, Deputy.

50 In the District Court of Appeal, State of California, Third Appellate District.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and the Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento, and the Judge Presiding in Department One Thereof, Respondents.

Writ of Certiorari.

The People of the State of California to the Police Court of the City of Sacramento, State of California, and the Judge Thereof, and the Superior Court of the State of California, in and for the County of Sacramento, and the Judge of Department One Thereof, Greeting:

You, the Police Court of the City of Sacramento, State of California, and the Judge thereof, are hereby commanded to certify

fully to this court at the office of the Clerk thereof, in the City of Sacramento, State of California, on the 9th day of March, 1915, at 10 o'clock A. M. a correct transcript of the record and proceedings including the testimony given and stipulations entered into at the trial and hearing had before you in an action wherein the People of the State of California was plaintiff and the Pacific Gas and Electric Company was defendant and wherein judgment was entered September 8, 1913, imposing a fine of $100.00 upon said defendant; and

50½ You, the Superior Court of the State of California, in and for the County of Sacramento, and the Judge of Department One thereof, are hereby commanded to certify fully to this court at the office of the Clerk thereof, in the City of Sacramento, State of California, on the 9th day of March, 1915, at 10 o'clock A. M. a correct transcript of the record and proceedings had before you in that certain action numbered 5262 on the Clerk's register of actions, taken to your court by appeal from the Police Court of said City of Sacramento, wherein the People of the State of California was plaintiff and the Pacific Gas and Electric Company was defendant and wherein judgment was entered December 8, 1913, affirming the judgment of said police court; to the end that the same may be reviewed by this Court.

Witness the Honorable N. P. Chipman, Presiding Justice of the District Court of Appeal, State of California, Third Appellate District, and the seal of said court this 2nd day of March, 1915.

JOHN T. STAFFORD,
Clerk District Court of Appeal,
Third Appellate District.

51 [Endorsed:] 1385. In the District Court of Appeal, State of California, Third Appellate District. Pacific Gas and Electric Company, a Corporation, Petitioner, vs. The Police Court of the City of Sacramento, et al., Respondents. Writ of Certiorari. Filed Mar. 3, 1915. John T. Stafford, Clerk. By Cavins Hart, Deputy.

52 In the District Court of Appeal, State of California, Third Appellate District.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, State of California, and the Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento and the Judge Presiding in Department One Thereof, Respondents.

Now come the respondents in the above entitled action and demur to the petition of petitioner herein, upon the ground that the same does not state facts sufficient to constitute a cause of action in favor

of the petitioner and against the respondents or either of them, and that the same does not state facts sufficient to constitute any ground for the issuance of a writ of certiorari or for the granting of any relief whatsoever to said petitioner.

Wherefore, respondents pray that said proceedings be dismissed.

ARCHIBALD YELL,
City Attorney and Attorney for Respondents.

52½ (Endorsed:) Due service hereof by copy admitted this 27th day of April, 1915. Thos. J. Straub and L. T. Hatfield, Attorney for Petitioner. 1385. In the District Court of Appeal, State of California Third Appellate District. Pacific Gas and Electric Company, a Corporation, Petitioner, vs. The Police Court of the City of Sacramento, et al., Respondents. Demurrer. Filed Apr. 28, 1915. John T. Stafford, Clerk, by Cavins Hart, Deputy. Archibald Yell, City Attorney and Attorney for Respondents.

53 In the District Court of Appeal, State of California, Third Appellate District.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Petitioner,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, State of California, and the Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento and the Judge Presiding in Department One Thereof, Respondents.

Comes now respondents in the above entitled proceeding and demur to the petition filed herein on the following grounds:

1.

That said petition does not state facts sufficient to constitute a cause of action.

2.

That said petition does not state facts sufficient to set out a case in which a writ of Certiorari will lie.

3.

That the court has no jurisdiction of the persons of the respondents, or either of them.

4.

That the Court has no jurisdiction of the subject of the action.

5.

That the Court has no jurisdiction of the subject of the proceeding.

Wherefore, respondents pray that said petition may be dis-
54 missed.

MALCOLM C. GLENN,
Judge of the Superior Court, Respondent,
By HUGH B. BRADFORD,
Attorney.

(Endorsed:) 1385. In the District Court of Appeal, State of California, Third Appellate District. Pacific Gas and Electric Company, a corporation, Petitioner, vs. The Police Court of the City of Sacramento, State of California, et al., Respondents. Demurrer. Filed Apr. 29, 1915. John T. Stafford, Clerk, by Cavins Hart, Deputy. H. B. Bradford, District Attorney; Archibald Yell, City Attorney, Attorneys for Respondents.

55 (From Judgment Book No. 2, page 363.)

Judgments, District Court of Appeal, State of California, Third Appellate District.

SACRAMENTO, Sept. 27, 1915.

No. 1385.

PACIFIC GAS & ELECTRIC CO., Petitioner,

vs.

CITY OF SACRAMENTO, etc., Resp'ts.

From the Superior Court in and for the County of Sacramento.

Writ of Mandate.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Burnett, J.

Whereupon, it is ordered, adjudged, and decreed by the Court, that the writ of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby denied.

Nov. 26th, 1915. The petition for a hearing is denied.

Remittitur issued Nov. 27th, 1915.

56 In the District Court of Appeal of the State of California in and for the Third Appellate District.

No. 1385.

PACIFIC GAS AND ELECTRIC COMPANY, a Corporation, Petitioner,

v.

THE POLICE COURT OF THE CITY OF SACRAMENTO, State of California, and the Judge Thereof, and the Superior Court of the State of California in and for the County of Sacramento and the Judge Thereof, Respondents.

Filed Sep. 27, 1915.

The application is for a writ of certiorari to review and annul the judgments entered in said courts, rendered in a criminal action prosecuted by the people against said petitioner for the violation of a certain ordinance of said city of Sacramento.

The petition filed herein shows that petitioner is a public utility corporation and owns and operates a street railway system in the city of Sacramento consisting of approximately sixteen miles of double track and eight miles of single track; that, during the years 1908 to 1912, inclusive, petitioner, under contracts therefor with the city of Sacramento, sprinkled the streets occupied by its tracks and received from said city as compensation therefor under said contracts the sum of $9,527.00, which sum was raised therefor by said city through the exercise of its regular taxing powers. The city commis-
57 sion of the city of Sacramento passed the ordinance in question, designed to compel the petitioner, at its own expense, during certain specified months of each year, to sprinkle said streets. Believing that said ordinance was void and of no effect, petitioner failed and refused to comply with any of the provisions thereof, whereupon an action was commenced against petitioner in the police court of said city and, notwithstanding petitioner's objections thereto that said ordinance was void and the court without jurisdiction thereunder, petitioner was prosecuted for and convicted of violating the same and fined four hundred dollars therefor, which judgment was afterwards affirmed by the superior court.

Said ordinance is as follows:

"Section 1. Every person, firm, or corporation owning, controlling or operating any street railroad, suburban railroad, or interurban railroad upon and along any of the streets of the City of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and the tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation.

"Section 2. The sprinkling required by the provisions of section 1 of this ordinance shall be done under the general supervision of the Superintendent of Streets, and such work shall be performed only between the hours of nine o'clock P. M. and seven o'clock A. M., unless otherwise directed by said Superintendent of Streets. The water used for sprinkling said streets may be taken from the city water system without charge; provided, that great care must be exercised in coupling hose to the hydrants so that injury to the same may be avoided; and provided also, that when a fire alarm is
58 sounded all hydrants must be instantly closed and must not be reopened until the signal indicating that the fire has been extinguished is given.

"Section 3. In the sprinkling of the streets, as required by this ordinance, oil macadam streets and streets paved with asphalt shall be lightly sprinkled but all other streets shall be thoroughly wet.

"Section 4. A violation of any of the provisions of this ordinance shall be and constitute a misdemeanor and shall be punishable by a fine of not to exceed five hundred dollars, or by imprisonment in the city jail for not to exceed six months, and for each day any such person, firm or corporation shall fail, refuse or neglect to sprinkle said streets, as in this ordinance provided, such person, firm or corporation must pay to the City of Sacramento as liquidated damages the sum of two dollars for each mile of street so left unsprinkled.

"Section 5. This is an ordinance for the immediate preservation of the public health, and is hereby declared to be an urgency measure and shall be in full force and effect from and after its passage."

The charging part of the complaint filed in said police court against petitioner was as follows:

"That at all the times in this complaint mentioned, the said defendant corporation owned, operated and controlled a street railroad upon and along and occupying certain streets of the City of Sacramento; that on the — day of July, 1913, and within the limits of the City of Sacramento, in the said State of California, the said defendant, Pacific Gas and Electric Company, a corporation as aforesaid, did then and there, before the filing of this complaint, and within one year prior thereto, wilfully and unlawfully fail, neglect and refuse to sprinkle with water the surface of the street or streets occupied by such corporation, at such times as were necessary
59 to keep the dust laid, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars owned, operated and controlled by said defendant corporation aforesaid, were in operation; which said failure, neglect and refusal of the said defendant corporation aforesaid was and is contrary to and in violation of lawful ordinance of the City of Sacramento, entitled: 'Ordinance No. 95, Third Series, An Ordinance providing for the sprinkling of streets occupied by street railways, suburban railways or interurban railways, within the City of Sacramento,' etc., passed by the City Commission of said City of Sacramento on the 19th day of June, A. D. 1913; and contrary to the form, force and effect of the

statute in such case made and provided and against the peace and dignity of the People of the State of California."

There is much discussion in the briefs as to whether the writ of certiorari will lie in such case as this where a trial has been had in an inferior court, an appeal regularly taken to the superior court and the judgment of the inferior court has been affirmed. Some doubt as to this is created by the decisions. For the purpose of this determination, however, we may assume that an application for the writ may be entertained.

The remaining question is whether the ordinance must be held to be inoperative and void—in other words, beyond the authority of the legislative council to enact. There is no controversy as to the regularity of any of the proceedings, but the sole contention is that petitioner committed no offense, by virtue of the fact that said ordinance, being invalid, could create or constitute the basis for no offense. We may observe, also, that the pronouncement of petitioner is not aided by any extraneous evidence as to the reasonableness of said ordinance, but the justification of its position
69 is sought in the plain significance of said provisions themselves in connection with the terms of petitioner's franchise. Respondents' contention is grounded in the proposition that said enactment is within the legal exercise of the police power of the municipality. Correlated to this is the affirmation by respondents that in order to prevail the burden is upon petitioner to show that said ordinance is invalid, all the presumptions being in favor of its validity.

For a discussion of the nature and extent of the police authority of municipalities we may refer to Pond on Public Utilities, sec. 93; Richmond R. R. Co. v. Richmond, 96 U. S. 521; In re Montgomery, 163 Cal. 457; Elliott on Roads and Streets, secs. 84, 85; In re Junqua, 10 Cal. App. 602; In re San Chung, 11 Cal. App. 511, 517; In re Ackerman, 6 Cal. App. 5, 9; Town of St. Helena v. San Francisco, etc. Ry., 24 Cal. App. 71; County of Plumas v. Wheeler, 149 Cal. 758, 762. It is probably sufficient to quote, of the above, from the Junqua case, as follows:

"That the police power is an inherent attribute of every state or commonwealth in the Union is a proposition which will readily be conceded. It is not only a power which inheres in the sovereignty of the states, but is a power the exercise of which by the states is indispensable essential to the health, peace, comfort and welfare generally of the inhabitants thereof. In this state the people themselves, by their constitution, have asserted this power, and have thus expressly conferred its exercise upon all counties, cities, towns and townships within the state. (Art. II, sec. 11.) * * * The only limitation upon the exercise of this power prescribed by the constitution is that the regulations so made shall not conflict with general laws. This power embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others. * * * In other words, the proposition
61 cannot be maintained that the exercise of this power is confined to the regulation only of such interferences with the

public welfare and comfort as come strictly within the common-law definition of a 'nuisance.'

"The legislature has expressly conferred upon the legislative authority of the city of Sacramento the power 'to determine what are nuisances, and to prevent the same,' and the right to so delegate such authority is within the legislative power of the state. But legislation, either local or general, which, when enacted under the pretext that it represents the exercise of the police power, is shown to be oppressive, thus imposing unnecessary or unreasonably burdensome conditions and restrictions upon and against that class upon which it is designed to directly operate, will not be sustained. * * * The determination of the legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to supervision by the courts. * * * 'Nor will they (the courts) in any event interfere except where the case be plain that needless oppression is worked and constitutional rights are invaded. * * * As it must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face thereof, evidence in such cases will be admitted to show the existing conditions.' (In re Smith, 143 Cal. 368, [77 Pac. 180].) * * * Whether it is impracticable to so control as to prevent soot emanating from such oil, when used as fuel, from escaping from a chimney or smokestack, or the effect of the regulation, as enforced, will be to prevent the use altogether of such oil as fuel, we cannot say from the face of the ordinance itself. * * * We must assume, from the fact of the passage of the ordinance and in the absence of evidence showing the contrary, that the governing board of the city of Sacramento has held that it has" a deleterious effect, "after (presumptively) an investigation of the facts. * * * The subject matter of the ordinance before us is within the jurisdiction of the legislative authority of the city of Sacramento."

62 It is well to note that the police power is assured by an express provision of the constitution, as follows: "Art. II. sec. 11. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with the general laws."

That the sprinkling of the streets so as effectually to lay the dust is demanded by considerations of health and comfort, of course, will not be gainsaid, and that the burden of such remedial measure should be imposed upon the agency producing the inconvenience, discomfort and menace to the health of the community would seem to be a just and equitable regulation and discrimination. And it may be remarked, in this connection, that this view is taken by the authorities which have been called to our attention by respondents.

In Elliott on Railroads, section 1082, it is said: "A municipal corporation cannot by contract surrender or alienate its governmental or police powers which the public welfare demands it should exercise. All rights granted to a municipality or contracts made by it with reference to the use of the streets are subject to its exercise of its police power, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable

regulations and ordinances enacted by the city in the exercise of its police power. Thus it has been held that a municipality may enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling the tracks." (See, also, Tiedemann on Limitations of Police Power, sec. 194; Dillon on Municipal Corporations, 5th ed., sec. 1276; Elliott on Roads and Streets, sec. 958; Nellis on Street Railways, sec. 157; McQuillan on Municipal Corporations, sec. 3774; Wilcox, Municipal Franchises, vol. 2, p. 691.)

In Milwaukee v. Milwaukee E. R. & L. Co., 111 Wis. 386, an ordinance similar to the one under consideration was involved.
63 It required all street railway companies to sprinkle with water the entire roadbed of the railways operated, between single tracks and double tracks and one foot outside of all tracks, as well as the space between double tracks. The sprinkling was to be done between April 1 and November 1 and the entire expense was to be borne by the street railway companies, except that the city was to furnish water free of charge. The defendant refused to comply with the ordinance and the rules adopted in pursuance thereof, and the city commenced a mandamus proceeding to compel the defendant to comply with the terms of the ordinance. The respondent contended that the city had no authority to pass such an ordinance. The city justified on three grounds: 1. A provision in its charter authorizing it to provide for the sprinkling of streets; 2. Broad police powers conferred on it empowering it to pass legislation abating nuisances and conserving the public health; 3. A statute of 1898. The court said:

"Ordinances requiring street railway companies to sprinkle the streets immediately adjacent to their tracks have been held valid by a number of courts. (City & S. R. Co. v. Savannah, 77 Ga. 731; State v. C. & C. R. Co., 50 La. Ann. 1189 [24 So. 265]; Newcomb v. Norfolk W. St. R. Co., 179 Mass. 449 [61 N. E. 42]; Chicago v. Chicago U. T. Co., 199 Ill. 259 [65 N. E. 243].) No decisions to the contrary have been cited and we have found none. Only in a case which is clear beyond a reasonable doubt will the courts declare laws void which are adopted under the police power in the interest of the public health. The validity of a city ordinance is tested by the same rule. (Citing cases.) We entertain no doubt that the power existed to pass an ordinance of the general character of the one adopted, provided such power was exercised in a proper manner." After considering the question of the reasonableness of the ordinance, the court proceeded: "It is next claimed that the ordinance is void because it is discriminatory. * * * In the
64 matter of stirring up dust and setting it in motion, street-car lines easily fall into a class by themselves. Their cars are large and heavy and run at a high rate of speed and with great frequency. The bodies of such cars rest close to the surface of the street. They occupy a very considerable of the best portion of the streets to the exclusion of the general public a large part of the time. They run on tracks which create peculiar conditions for the accumulation of dust and dirt, and they occupy the streets by

permission from the common council and not as a matter of absolute right. No other agency stands on the same footing with the street cars in the matter of raising dust. * * * Of course, many different kinds of vehicles occupy the streets and all stir up more or less dust when the necessary conditions exist, but it does not follow that because all are not called upon to contribute all must escape. This would entirely exclude the idea of classification. The purpose of this law is to provide for the sprinkling of a well defined portion of the public streets of the city. The appellant has, under the franchise granted to it, a paramount right to use and occupy this particular part of the street. In so doing it is largely responsible for setting in motion the dust that arises therefrom and falls within a class by itself."

In the case above cited, State v. C. & C. R. Co., also found in 56 L. R. A., 287, the supreme court of Louisiana said: "Of course, it is idle for the council to attempt to coerce those corporations to so operate their cars as to create no dust. That would be a physical impossibility. Hence the city council has attempted to do the only thing which, in our opinion, it was possible for them to have done; that is, to pass an ordinance requiring them 'to water their tracks so as to effectually keep the dust laid on same.' On reason and authority we are of opinion the ordinance of the city council of the city of New Orleans must be sustained as a legal exercise of the police power, and as neither indefinite nor unreasonable."
65 (See Chester v. Chester Trac. Co., 5 Pa. Dist. Reps. 609; St. Paul v. Haughbro, 93 Minn. 59, [66 L. R. A. 441]; St. Paul v. St. Paul City Ry. Co., 130 N. W. 1108; Passenger R. R. Co. v. Birmingham, 51 Pa. 41; Mayor of the City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673.)

As a matter of some importance and bearing upon the question, and as evidence of a general affirmation of such police power, we may also refer to the fact that many cities have recognized this as the rule and have adopted ordinances in accordance therewith. For instance, the city of Chicago has the following ordinance:

"Every person or corporation operating or maintaining street railway tracks located in and along the different streets within the city, shall, except as otherwise expressly provided in the respective ordinances under which tracks have heretofore been or may hereafter be authorized to be laid, when ordered so to do by the commissioner of public works, keep moistened and well sprinkled with water in a manner satisfactory to the commissioner of public works the several streets upon and along which they, or either of them, may operate or maintain his or its respective tracks.

"Every person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense, and a separate and distinct offense shall be deemed to have been committed each and every day on which said person or corporation shall neglect, fail, or refuse to comply with any of the provisions of this section."

An ordinance of Memphis and an ordinance of St. Louis are to the same effect.

We think that it would be going a long way toward unjustifiable interference with that discretion in such matters committed by the constitution to the various municipalities of the state if we should hold that this ordinance upon its face bears the proof of un-
66 reasonableness and injustice. The truth is, of course, as we have seen, that the presumptions are in its favor. We must assume, in the absence of a showing to the contrary, that it is a reasonable requisite to promote the comfort and health of the community and that the particular injury complained of is caused entirely by the acts of petitioner. We may go further and declare the assumption that the ordinance will be given a reasonable construction and application so as to embarrass and burden as little as possible this corporation, engaged as it is in an important public service. We cannot hold that petitioner will or may be required under this ordinance to water the streets from curb to curb. The object is effectually to lay the dust that would otherwise be dis*tu*bed and disseminated by the operation of petitioner's cars. This could probably be accomplished by sprinkling the track and one or two feet on the outside and by means of the operation of the sprinkler along the rails. At least, we may so assume in the face of the record before us. Nor need petitioner be apprehensive that it will be mulched in damages for a slight disturbance of the dust.

All that any just and reasonable court would require is that an effort be made in good faith to comply with the terms of said ordinance, and we venture to assert that the difficulty and expense incident to the fair operation and execution of said ordinance have been greatly exaggerated by petitioner. It must be assumed that there is no desire on the part of the city officials wantonly to embarrass petitioner and that a reasonable attitude of acquiescence toward a just policy for the promotion of the public health, safety and comfort will enure to the benefit of petitioner as well as to the community generally.

We entertain no doubt that petitioner has failed to make a sufficient showing to justify us in holding said ordinance invalid,
67 and the order to show cause is discharged and the writ denied.

BURNETT, *J.*

We concur:

HART, *J.*
CHIPMAN, *P. J.*

(Endorsed:) District Court of Appeal, Third Appellate District. No. 1385. Pacific Gas & Elec. Co. vs. Police Court of the City of Sacramento, et al. Opinion. Filed Sep. 27 1915. John T. Stafford, Clerk.

68 In the Supreme Court of the State of California, in Bank.

Civil No. 1385. Sac. No. 2448.

PAC. GAS & ELECTRIC CO.
vs.
POLICE COURT CITY OF SAC.

BY THE COURT:

The petition to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal for the Third Appellate District is denied.

Dated this 26th day of Nov. 1915.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true and correct copy of an order of this court, as shown by the records of my office.

Witness my hand and the seal of the Court this 26th day of Nov. A. D. 1915.

[SEAL.]

B. GRANT TAYLOR, *Clerk*,
By ERB, *Deputy Clerk*.

Filed Nov. 26, 1915. John T. Stafford, Clerk, by Cavins Hart, Deputy.

69 I, John T. Stafford, Clerk of the District Court of Appeal in and for the Third Appellate District of the State of California, do hereby certify that the preceding and annexed typewritten pages, numbered 1 to 47, both inclusive, contain true and correct copies of (*a*) Petition for Writ of Certiorari; (*b*) Order that Writ of Certiorari issue; (*c*) Writ of Certiorari; (*d*) Demurrer; (*e*) Demurrer; (*f*) Entry in Judgment Book No. 2, page 363; (*g*) Opinion of Court; and (*h*) Order denying hearing in Supreme Court, in action numbered 1385, in which Pacific Gas and Electric Company, a corporation, is Petitioner, and The Police Court of the City of Sacramento, et al., are Respondents, as shown by the records of my office.

Witness my hand and the seal of the Court, this seventh day of April, A. D., 1917.

[Seal District Court of Appeal, Third Appellate District, State of California.]

JOHN T. STAFFORD, *Clerk*,
By CAVINS HART, *Deputy*.

Endorsed on cover: File No. 25,908. California, Third Appellate District, District Court of Appeal. Term No. 1078. Pacific Gas and Electric Company, plaintiff in error, vs. The Police Court of the City of Sacramento, State of California, and Hon. J. J. Henderson, Judge thereof, et al. Filed April 17th, 1917. File No. 25,908.

FILED
OCT 7 1919
JAMES D. MAHER,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff in Error,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and HON. J. J. HENDERSON, Judge thereof, et al.,
Defendants in Error.

No.

In Error to the District Court of Appeal, Third Appellate District, of the State of California.

Brief for Plaintiff in Error.

WM. B. BOSLEY,
San Francisco, California,
Attorney for Plaintiff in Error.

Subject Index.

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1. STATEMENT OF THE CASE 1

In this Statement it is shown: (a) that plaintiff in error, having been convicted of a violation of an ordinance of the City of Sacramento commanding owners of street and other railroads to sprinkle, without cost to said city, so much of the surface of the streets occupied by such railroads as might be necessary to prevent dust from arising when cars are in operation, applied to the District Court of Appeal, in the Third Appellate District of California for a writ of certiorari, in order that the judgment of conviction might be reviewed and annulled upon the ground that said Ordinance was repugnant to the Constitution of California and also to the Constitution of the United States; (b) that said District Court of Appeal, having entered judgment denying the writ of certiorari, the case was brought to this Court by writ of error; and (c) that the sole question presented by the record for determination by this Court is whether or not said ordinance is void for repugnancy to the Fourteenth Amendment to the Constitution of the United States.

2. SPECIFICATION OF ERRORS 10

Showing that the errors relied upon are that said District Court of Appeal, in making and entering its said judgment, decided erroneously that said ordinance did not deprive plaintiff in error of property without due process of law, nor deny to plaintiff in error the equal protection of the laws in violation of section 1 of article XIV of the amendments to the Constitution of the United States.

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(a) The fact that said ordinance No. 95 was enacted by the City of Sacramento in the exercise of the police power of the State of California and professedly "for the immediate preservation of the public health" is not at all determinative of its validity, because the police power of the State of California is subject to, and controlled by, the limitations imposed upon the several States by the Fourteenth Amendment and other provisions of the Constitution of the United States 39

(b) The said Ordinance No. 95, if enforced, will operate to deprive plaintiff in error of its property for public use, without compensation, and, therefore, without due process of law, in violation of the Fourteenth Amendment 43

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff in Error,

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and HON. J. J. HENDERSON, Judge thereof, et al.,
Defendants in Error.

In Error to the District Court of Appeal, Third Appellate District, of the State of California.

Brief for Plaintiff in Error

Statement of the Case.

This case is before this Court on a writ of error to the District Court of Appeal of the State of California, in the Third Appellate District. The purpose of plaintiff in error is to obtain a review of the final judgment of said District Court of Appeal discharging and denying the writ of *certiorari* for which plaintiff in error had applied.

The case was heard and determined by said District Court of Appeal upon the demurrer of the defendants in error to the petition of plaintiff in error. The effect of that demurrer, according to the practice in California, was to admit all of the facts well pleaded in that petition. The facts so pleaded are, in substance, as follows:

1. Plaintiff in error is a public utility corporation organized under the laws of the State of California, and owns and operates a street railway system in the City of Sacramento, in said State, under and by virtue of certain franchises which were granted to plaintiff in error, or its predecessors, at divers times between April 1, 1887, and October 16, 1911, under and pursuant to the provisions of the Civil Code of California relating to street railway corporations. Some of said franchises were granted by the City of Sacramento, and the others by the County of Sacramento. In none of the ordinances by which said franchises were granted was there any provision empowering the governing body of said City of Sacramento to require the owner of such franchises, or any of them, to sprinkle the streets occupied by the street railways constructed under the authority thereof.

2. In the month of June, 1913, the City Commission of the City of Sacramento[1] adopted an ordi-

[1] The City of Sacramento was originally incorporated in 1863 by an act of the legislature of the State of California, and continued to exist under its legislative charter until January, 1894, when its first charter adopted under the provisions of section 8 of article XI of the Constitution of California and approved by the Legislature February 7, 1893, took effect. The last mentioned charter remained in effect until July 1, 1912, when the present charter of Sacramento, having been duly adopted and approved pursuant to section 8 of article XI of the Constitution of California, took effect (Tr. page 13).

nance designated as "Ordinance No. 95, Third Series", a true copy whereof, omitting the title is as follows:

"Be it ordained by the City Commission of the City of Sacramento as follows:

Section 1. Every person, firm, or corporation owning, controlling or operating any street railroad, suburban railroad, or interurban railroad upon and along any of the streets of the City of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and the tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation.

Section 2. The sprinkling required by the provisions of Section 1 of this ordinance shall be done under the general supervision of the Superintendent of Streets, and such work shall be performed only between the hours of nine (9) o'clock P. M. and seven (7) o'clock A. M., unless otherwise directed by said Superintendent of Streets. The water used for sprinkling said streets may be taken from the city water system without charge; provided, that great care must be exercised in coupling hose to the hydrants so that injury to the same may be avoided; and provided also, that when a fire alarm is sounded all hydrants must be instantly closed and must not be reopened until the signal indicating that the fire has been extinguished is given.

Section 3. In the sprinkling of the streets, as required by this ordinance, oil macadam streets and streets paved with asphalt shall be

lightly sprinkled, but all other streets shall be thoroughly wet.

Section 4. A violation of any of the provisions of this ordinance shall be and constitute a misdemeanor and shall be punishable by a fine of not to exceed five hundred ($500.00) dollars, or by imprisonment in the city jail for not to exceed six months, and for each day any such person, firm or corporation shall fail, refuse or neglect to sprinkle such streets, as in this ordinance provided, such person, firm or corporation must pay to the City of Sacramento as liquidated damages the sum of two ($2.00) dollars for each mile of street so left unsprinkled.

Section 5. This is an ordinance for the immediate preservation of the public health, and is hereby declared to be an urgency measure and shall be in full force and effect from and after its passage.

Passed, June 19, 1913.

M. J. BURKE,
President of City Commission.

Attest: M. J. DESMOND,
City Clerk."

3. In each of the years from 1908 to 1912, inclusive, the City of Sacramento provided for the sprinkling of the streets occupied by the aforesaid street railway system under a contract with the plaintiff in error for the performance of that service, and paid therefor a stipulated sum of money which was raised by said City by general taxation; and, in each of said years from 1908 to 1912 and in each of the next two succeeding years, i. e. 1913 and 1914, said City of Sacramento raised by general taxation the

sums required to defray the expense of sprinkling all of its streets which were actually sprinkled.

4. Compliance with said Ordinance No. 95 would necessitate the expenditure by plaintiff in error of at least $2200.00 each year.

5. Plaintiff in error, being advised that said Ordinance No. 95 was unconstitutional and void, failed and refused to comply with said Ordinance and to sprinkle the streets occupied by its street railway tracks, and was thereupon convicted for violation of said Ordinance No. 95 and fined by the Police Court of the City of Sacramento, one of the defendants in error, in the sum of $400.00.

6. The judgment of said Police Court was affirmed on appeal by the Superior Court of the State of California in and for the County of Sacramento, one of the defendants in error. Plaintiff in error took an appeal from the judgment of the Superior Court affirming the judgment of the Police Court to the Supreme Court of California, which dismissed said appeal on the ground that no appeal lay from the last mentioned judgment.

7. Plaintiff in error made its defense in said Police Court and on appeal in said Superior Court on the ground that said Ordinance No. 95 was void, and consequently that the facts set forth in the complaint upon which it was convicted in the Police Court did not constitute a public offense, for the reason, among others, that said Ordinance No. 95 was repugnant to the Constitution of the United States, and particularly to those provisions of arti-

cle XIV of the amendments thereto which provide that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

8. Plaintiff had no appeal from the said judgment of said Superior Court, nor any plain, speedy or adequate remedy.

Plaintiff in error, in its aforesaid petition (a true copy of which is contained on pages 12 to 29 of the transcript of record in this court), specially set up and claimed, as the ground upon which it sought the issuance of a writ of certiorari and the annulment of the judgments of said Police Court and said Superior Court, that said Ordinance No. 95 was void for repugnancy to certain provisions of the Constitution and general laws of California and also for repugnancy to those provisions of the Constitution of the United States which are more specifically referred to in the assignment of errors hereinafter mentioned (Tr. page 22).

Defendants in error demurred, in said District Court of Appeal, to the aforesaid petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action, and that said court did not have jurisdiction either of the persons of the respondents therein or of the subject of the action or proceeding (Tr. pages 31 to 33).

The District Court of Appeal, having heard the case on the demurrer to the petition, rendered its

decision September 27, 1915. In this decision, the District Court of Appeal overruled, in effect, the objections to its jurisdiction raised by the defendants in error, and, deciding the case on the merits, held that said Ordinance No. 95 was a valid exercise of the police power of the State of California vested in said City of Sacramento, and entered judgment against plaintiff in error and in favor of defendants in error discharging and denying the writ of certiorari (Tr. pages 33-40).

Within the time allowed therefor by the Constitution and laws of the State of California, plaintiff in error applied to the Supreme Court of the State of California to have the case heard and determined by it after judgment of said District Court of Appeal; but the Supreme Court of California, November 26, 1915, made an order denying the application, and caused a certified copy of said order to be filed with the Clerk of said District Court of Appeal. Thereupon the judgment of said District Court of Appeal became final (Constitution of California, Art. VI, Sec. 4) (Tr. page 41).

The judgment of said District Court of Appeal which plaintiff in error seeks to have reviewed on this writ of error is a final judgment of the highest court of the State of California in which a decision in said case could be had, and is a decision in favor of the validity of a statute of the State of California, to wit, said Ordinance No. 95, the validity of which was drawn in question in said District Court of Appeal on the ground that it was repugnant to the

Constitution of the United States. Therefore, under and by virtue of the Constitution of the United States and section 237 of the Judicial Code and on the authority of the decisions of this court in

Chicago, B. & Q. Ry. Co. v. Illinois ex rel. Grimwood, 200 U. S. 561, 580-1;

Western Turf Association v. Greenberg, 204 U. S. 359, 362; and

New Orleans Waterworks Co. v. Louisiana Sugar Refining Company, 125 U. S. 18, 31;

this Court has jurisdiction to re-examine and reverse or affirm said judgment on this writ of error which was sued out by the plaintiff in error within the time allowed therefor by law.

The question presented by the record for determination by this Court is whether or not said Ordinance No. 95 is void for repugnancy to the Constitution of the United States. This question is presented by the assignment of errors which accompanied the petition of the plaintiff in error for allowance of this writ of error and which is copied on pages 4, 5 and 6 of the transcript of record in this Court. The errors assigned are, in substance as follows, viz:

1. That said District Court of Appeal erred in rendering and entering judgment in favor of defendants in error and against plaintiff in error discharging and denying the writ of certiorari prayed for in the petition filed therein by plaintiff in error, upon the ground that the aforesaid judgment of said Police Court and the aforesaid judgment of said

Superior Court were, and each of them was, void, and that said Police Court and said Superior Court had exceeded the jurisdiction vested in them respectively in rendering said judgments, because the acts with which plaintiff in error was charged in the complaint filed in said Police Court did not constitute a public offense for the reason that said Ordinance No. 95, with the violation of which plaintiff in error was charged, was repugnant to that provision of section 10 of article I of the Constitution of the United States of America which declares that no state shall pass any law impairing the obligation of contracts, and repugnant to those provisions of section 1 of article XIV of the amendments to the Constitution of the United States of America which declare that no state shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; and

2. That said District Court of Appeal, in rendering and entering its said judgment in favor of defendants in error and against plaintiff in error discharging and denying the writ of certiorari prayed for as aforesaid, erred, because in so doing it decided in favor of the validity of said Ordinance No. 95 of said City of Sacramento notwithstanding the fact that said ordinance is, and was claimed by plaintiff in error in its petition filed in said District Court of Appeal to be, repugnant to the aforesaid provisions of section 10 of article I of the Constitution of the United States of America and to the

aforesaid provisions of section 1 of article XIV of the amendments to the Constitution of the United States of America.

For the purpose of more narrowly limiting the question presented to this Court for determination, and because said Ordinance No. 95 purports on its face to be an exercise of the police power of the City of Sacramento for the preservation of the public health and said District Court of Appeal considered and sustained its validity in that aspect, and as said Ordinance does not prohibit the plaintiff in error from continuing to maintain and operate its said street railways under and pursuant to its aforesaid franchises in all respects as authorized by the ordinances granting the same but merely imposes on plaintiff in error and others who own and operate railroads in the streets of Sacramento the additional duty of sprinkling the streets occupied by such railroads, under penalty of fine or imprisonment, the plaintiff in error now expressly waives its objection that said Ordinance No. 95 impairs the obligation of the contracts made by the grant and acceptance of its said franchises.

Specification of Errors.

Plaintiff in error specifies, as the errors upon which it relies to obtain reversal of the judgment of said District Court of Appeal, the following, viz:

(1) Said District Court of Appeal erred in deciding, in and by its said judgment, that said

Ordinance No. 95, which imposes on plaintiff in error the burden of sprinkling with water, at its own cost, the streets occupied by its street railways, was a valid exercise of the police power vested in said City of Sacramento, and was not repugnant to that clause of article XIV of the amendments to the Constitution of the United States of America, which declares that no state shall deprive any person of property without due process of law; and

(2) Said District Court of Appeal erred in deciding, in and by its said judgment, that said Ordinance No. 95, which imposes on plaintiff in error the burden of sprinkling with water, at its own cost, the streets occupied by its street railways, was a valid exercise of the police power vested in said City of Sacramento, and was not repugnant to that clause of article XIV of the amendments to the Constitution of the United States of America, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Argument.

INTRODUCTION CONTAINING A PRECISE STATEMENT OF THE POINTS INVOLVED.

For the purpose of explicating and defining the precise points to be considered, and eliminating from consideration all extraneous questions, plaintiff in error admits that, subject to the limitations con-

tained in its charter, the Constitution of California, and the Constitution of the United States, the City of Sacramento possesses the following powers, viz:

1. The power granted by sections 8 and 11 of article XI of the Constitution of California to make and enforce laws and regulations in respect to its municipal affairs, and generally to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws;

2. The power to make and enforce ordinances providing for sprinkling, cleaning and repairing its public streets;

3. The power to levy and collect taxes for municipal purposes, including the payment of all expenses incurred and to be incurred in sprinkling, cleaning and keeping in repair its public streets; and

4. The power to levy and collect, as a means of providing the funds required to pay for municipal improvements, local assessments upon lands and interests in lands and street railway franchises considered as interests in or servitudes upon the public streets.

It is to be noted in this connection that the power to levy and collect taxes vested in the City of Sacramento is subject to the limitation contained in section 1 of article XIII of the Constitution of California, which provides that "all property in the state except as otherwise in this constitution provided, not exempt under the laws of the United

States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided". Furthermore, the provisions of section 14 of article XIII of the Constitution of California, as construed in *San Francisco v. Pacific Telephone and Telegraph Company*, 166 Cal. 244, and *Southern Pacific Company v. Levee District No. 1 of Sutter County*, 172 Cal. 345, preclude all municipal corporations from levying any tax or license upon certain classes of public utility property including street railways, all property used exclusively in the operation of street railways, and the franchises under authority of which street railways are constructed, maintained and operated. The pertinent provisions of said section 14 of article XIII are printed in the footnote.[2]

[2] "Sec. 14. *Taxes levied*, assessed and collected as hereinafter provided *upon railroads, including street railways*, whether operated in one or more counties; sleeping-car, dining-car, drawing-room car and palace-car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this state; companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and *taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes*, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.

"(a) *All railroad companies, including street railways*, whether operated in one or more counties; all sleeping-car, dining-car, drawing-room car, and palace-car companies, all refrigerator, oil, stock, fruit, and other car-loaning and other car companies, operating upon the railroads in this state; all companies doing express business on any railroad, steamboat, vessel or stage line in this state; all telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity *shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state*, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this state. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based

It is also conceded, for the purposes of this argument, that the provisions of section 14 of article XIII of the Constitution of California, to which reference is made in the last paragraph, do not preclude municipal corporations from levying local assessments upon street railways and street railway franchises for the purpose of paying the cost of municipal improvements; and that the only constitutional limitations on the power of the City of Sacramento to levy local assessments for municipal improvements are those which are involved in the provisions of section 1 of article XIV of the amendments to the Constitution of the United States, which prohibit the several states from depriving any person of life, liberty or property

upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

"The percentages above mentioned shall be as follows: On all railroad companies, including street railways, four per cent; on all sleeping-car, dining-car, drawing-room car, palace-car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies, three per cent; on all companies doing express business on any railroad, steamboat, vessel or stage line, two per cent; on all telegraph and telephone companies, three and one-half per cent; on all companies engaged in the transmission or sale of gas or electricity, four per cent. *Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; provided, that nothing herein shall be construed to release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this state.*"

* * * * * * * *

"(d) *All franchises*, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and *shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state.*"

* * * * * * * *

"(f) All the provisions of this section shall be self-executing and the legislature shall pass all laws necessary to carry this section into effect, and shall provide for a valuation and assessment of the property enumerated in this section and shall prescribe the duties of the state board of equalization and any other officers in connection with the administration thereof."

* * * * * * * *

(All italics mine.)

without due process of law, and from denying to any person within their respective jurisdictions the equal protection of the laws, and the corresponding provisions of the Constitution of California.

The precise question to be considered is, therefore, whether or not the imposition on plaintiff in error by the City of Sacramento, by the enactment and enforcement of the aforesaid Ordinance No. 95, of the burden of sprinkling, at its own cost, the public streets to the extent specified in said Ordinance, comes within the prohibition of those provisions of section 1 of article XIV of the amendments to the Constitution of the United States, which declare that no state shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

The performance of the duty which is imposed upon plaintiff in error by said Ordinance No. 95, under penalty of fine or imprisonment, would necessitate the use of its property and the annual expenditure of from $2200.00 to $3000.00 of its money according to the admitted allegations of the petition filed in said District Court of Appeal by plaintiff in error. Said Ordinance No. 95, having been enacted by the City of Sacramento under authority conferred by the Constitution of California and the charter of said City adopted pursuant thereto, and its validity as an exercise of the police power having been sustained by the said District Court of Appeal, is, therefore, within the operation

of the Fourteenth Amendment, a law of the State of California, which, if enforced, will deprive plaintiff in error of its property and the use of its property for a public use, to wit, the laying of the dust in the streets in the City of Sacramento as a means of preserving the public health and welfare. Said Ordinance No. 95 is not, either in form or in substance, a constitutional exercise of the power of eminent domain, for the reason that it makes no provision for compensating in any manner or to any extent those whose property is to be taken. Therefore, unless said Ordinance No. 95 can be sustained as a constitutional exercise of a right or power founded upon contract, or inherent in the power to levy and collect taxes and assessments, or included in the police power, i. e., the general unclassified governmental power inherent in sovereignty to make and enforce all manner of laws necessary or proper to promote the public health, public morals, public safety, public convenience, and the general prosperity and welfare, the conclusion is inevitable that said Ordinance No. 95 is repugnant to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

The question of the constitutionality of said Ordinance No. 95, whose validity was sustained by the judgment of said District Court of Appeal upon the ground that it was a constitutional exercise of the police power, may, therefore, be resolved into the following:

1. Is said Ordinance No. 95 a constitutional exercise of a right or power founded upon contract?

2. Is said Ordinance No. 95 a constitutional exercise of a right or power inherent in the power to levy and collect taxes and assessments? and

3. Is said Ordinance No. 95 a constitutional exercise of a right or power included in the police power, i. e., the general unclassified governmental power to make and enforce all laws necessary or proper to promote the public health, public morals, public safety, public convenience, and the general prosperity and welfare?

Each of these three questions should, on both principle and authority, be answered in the negative, as I shall now proceed to prove:

PROPOSITION NO. 1. SAID ORDINANCE NO. 95 IS NOT A CONSTITUTIONAL EXERCISE OF ANY RIGHT OR POWER FOUNDED UPON CONTRACT.

At the time of the enactment of said Ordinance No. 95, there existed no contract, nor anything in the nature of a contract, from which the right to impose the obligation attempted to be created by said Ordinance No. 95 could have been derived.

In support of this proposition I submit the following:

(a)

1. It is expressly alleged, in the petition filed by plaintiff in error in the said District Court of

Appeal and in legal effect admitted by the demurrers filed by defendants in error, "that in none of said franchises under which petitioner maintains and operates its said street railway system, whether granted by said City of Sacramento or by the Board of Supervisors of said County of Sacramento, is there any provision or reservation empowering the governing body granting the same to require petitioner or any of its predecessors to sprinkle any portion of any of the streets occupied by its street railway tracks, or to sprinkle any street or highway of said City or of said County under any circumstances whatsoever" (Tr. page 13).

2. At no time herein mentioned was there, in the Constitution, codes or statutes of California, or in the charter of the City of Sacramento, any provision imposing on the grantee or owner of street railway franchises granted by said County or by said City prior to the taking effect of the present charter of said City, July 1, 1912, any obligation to sprinkle the streets occupied by street railways constructed under authority of such franchises.

3. At no time herein mentioned was there, either in the present or in any previous charter of the City of Sacramento, or in the Constitution, codes or statutes of California, any provision either conferring upon or reserving to said City of Sacramento the right, power or authority to alter, amend revoke or repeal any ordinance or other municipal legislative act granting any street railway or other

municipal franchise after its acceptance by the grantee.

(b)

If it should be contended on behalf of defendants in error that the City of Sacramento, as an agency of the State of California, may exercise the right to alter or amend ordinances granting street railway franchises by virtue of the reserved power of the State of California to alter and amend laws concerning corporations, my answer is that the power so reserved to the State may be exercised only by the Legislature of the State, or by the People of the State under the initiative and referendum provisions of its Constitution.

The power to alter and amend laws concerning corporations is reserved in section 1 of article XII of the Constitution of California, which reads as follows:

> "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in the State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

This section is to be construed in connection with section 24 of the same article, and sections 1 and 25 of article IV of the Constitution of California.

Section 24 of article XII reads as follows:

> "The Legislature shall pass all laws necessary for the enforcement of the provisions of this article."

The first paragraph of section 1 of article IV reads as follows:

> "The legislative power of the State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California', but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature. The enacting clause of every law shall be 'The people of the State of California do enact as follows'."

The remainder of section 1 of article IV deals with the method of exercising the initiative and referendum.

Section 25 of article IV provides:

> "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:
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> * * * * * *
>
> "Nineteenth—Granting to any corporation, association or individual any special or exclusive right, privilege, or immunity;
>
> * * * * * *
>
> "Thirty-third—In all other cases where a general law can be made applicable."

It is perfectly plain from a reading of the provisions of the Constitution of California which I have just quoted that the power to enact general laws providing for the creation of corporations and to alter or repeal laws concerning corporations pursuant to section 1 of article XII is vested in the

Legislature of California to the exclusion of all municipal legislative bodies, and may not be exercised otherwise than by the Legislature, or by the People of the State under the reserved powers popularly called the initiative and referendum.

Furthermore the power reserved by section 1 of article XII of the Constitution of California, to alter or repeal laws concerning corporations, does not include the power to alter or revoke franchises granted, by or under authority of law, upon sufficient consideration, or to take for public use, without just compensation, the property of any corporation. This proposition is abundantly supported by the authorities. It will be sufficient to refer to the following, viz:

> Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 120-3;
>
> Johnson v. Goodyear Mining Company, 127 Cal. 4, 17-8; and
>
> Chicago, Milwaukee and St. Paul R. Co. v. Wisconsin, 238 U. S. 491, 501-2.

(c)

It is possible that, in support of a contention that said Ordinance No. 95 may be sustained as an exercise of a right contractual in its nature, defendants in error may invoke the provisions of section 21 of article I of the Constitution of California, which reads as follows:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall

> any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

If such a contention shall be made, a sufficient answer is that the right or power reserved by section 21 of article I of the Constitution of California may be exercised only by the Legislature of the State or by the People of the State under the reserved powers designated as the initiative and referendum, and that this power may not in any case be exercised by any municipal corporation or political subdivision of the State. See Northern Ohio T. & L. Co. v. Ohio, 245 U. S. 574, 584.

Furthermore, I submit that, when considered with the context, the provision of section 21 of article I of the Constitution of California, which declares that "no special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature", ought not to be construed as a reservation to the Legislature of the right or power to alter, revoke or in any manner cancel or terminate any contract made by the State of California or one of its municipal corporations or political subdivisions with a natural person or private corporation whereby, in consideration of the payment of money or the performance of a service to the public, a franchise or right in the nature of an easement or servitude to occupy some portion of a public street so far as may be necessary for the construction, maintenance and operation of a street railroad is granted. But, whatever may be the scope of the power so reserved, the City

of Sacramento, a municipal corporation of the State of California, derives no authority therefrom; and, in the absence of an express reservation to itself, in its charter or in the ordinances by which it granted the street railway franchises now owned by plaintiff in error, of the right so to do, the City of Sacramento possesses no right, certainly no right founded upon contract, to alter, revoke, or repeal the aforesaid street railway franchises, or, under the guise of an amendment of the ordinances granting such franchises, to take from the plaintiff in error any part of its property or the use of any of its property without just compensation. For support of the last proposition, if support be needed, I refer this court to its decision in Grand Trunk Western Ry. Co. v. South Bend, 227 U. S. 544, wherein it was held that an ordinance of the City of South Bend purporting to repeal in part an earlier ordinance granting the right to lay a double track railroad in a specified street was void because it impaired the obligation of the contract made by the grant and acceptance of that right, there having been no reservation of the right to alter, amend or repeal the ordinance by which the right was granted.

PROPOSITION NO. 2. SAID ORDINANCE NO. 95 IS NOT A CONSTITUTIONAL EXERCISE OF A RIGHT OR POWER INHERENT IN THE POWER TO LEVY AND COLLECT TAXES AND ASSESSMENTS.

In support of this proposition I submit the following:

(a)

The Power to Levy and Collect Taxes.

The exaction which the City of Sacramento attempted to make by the enactment and enforcement of said Ordinance No. 95 does not come within any legal definition of a tax.

The term "tax" is defined in the opinion of Mr. Justice Field in the Income Tax Cases, 157 U. S. 429, 599, as follows:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

Cooley, in his work on Taxation (3rd ed., pages 1 and 4) defines taxes and states the fundamental requirements of every tax as follows:

> "Definition. Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs" (page 1).
>
> * * * * *
>
> "Fundamental requirements. Taxes are supposed to be regular and orderly, and they are commonly required to be paid at regular periods. They differ from the forced contributions, loans and benevolences of arbitrary and tyrannical periods, in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of government. In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions,

> regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. So the power is not arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the tax payer against exceptional and invidious exactions, and it is to have effect through established rules operating impartially." (page 4)

From a comparison of the provisions of said Ordinance No. 95 with the foregoing definitions of a tax, it appears that the only attribute which is common to a tax and the exaction attempted to be made by said Ordinance is that each is an enforced contribution levied by or under authority of the State for a public purpose. That exaction differs from a tax by being levied, not according to any rule of proportion, but arbitrarily.

Moreover, it having been shown on pp. 12-3, *ante*, that the Constitution of California requires that all taxes upon property be levied in proportion to its value and, in addition, expressly precludes municipal corporations from levying any tax or license upon street railway companies, their franchises and properties, this court will surely not go out of its way to sustain, as an exercise of the power of taxation, an ordinance which was sustained by the California courts upon the sole ground that it was a valid exercise of the police power.

(b)

The Power to Levy and Collect Local Assessments.

The exaction, which the City of Sacramento attempted to make by the enactment and enforcement

of said Ordinance No. 95, does not come within the legal definition of the term "local assessment". The term "assessment" or "local assessment" is defined by the Supreme Court of California in Spring Street Company v. City of Los Angeles, 170 Cal. 24, 29-30, quoting from Hamilton on Law of Special Assessments, as follows:

> "It (i. e., a special or local assessment) is 'a compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein, enhancing the present value of such real estate, and laid by some reasonable rule of uniformity based upon, in the ratio of, and limited by, such enhanced value'."

See also, Cooley on Taxation, 3rd ed., pp. 1153-5.

The burden attempted to be imposed by said Ordinance No. 95 upon plaintiff in error and other railroad companies occupying the streets of Sacramento, is not laid by any "rule of uniformity based upon, in the ratio of, and limited by", any actual or presumed enhancement of the value of street railways to result from the sprinkling of the streets occupied by them; nor does the said Ordinance contemplate any "permanent public improvement". Furthermore, the exaction provided for in said Ordinance No. 95 is neither levied nor made a lien upon any property, real or personal, of those who own or operate street or other railways in the public streets; but the duty thereby created is imposed upon them as a personal obligation, any breach of which is declared

to be a misdemeanor punishable by a fine or imprisonment. For these reasons said Ordinance does not come within the proper definition or meaning of a local assessment.

(c)

Constitutional Limitations on the Power to Levy and Collect Special or Local Assessments.

If said Ordinance No. 95 should, notwithstanding its form, be deemed to be in substance an exercise of the power to levy special or local assessments, it could not nevertheless be sustained as a constitutional exercise of that power for the following reasons, viz:

1. The burden of service and expense imposed by said Ordinance upon the companies which own or operate street, suburban and interurban railways in the streets of Sacramento is not based upon any real or presumed benefit peculiar to such companies nor any enhancement of value peculiar to their railway properties;

2. Said burden was imposed, as appears by the positive declaration contained in the last section of said Ordinance, for the "immediate preservation of the public health", and not in aid of the construction, maintenance or use of any public work or improvement, from which any benefit or advantage peculiar to the persons subjected to that burden can reasonably be expected to accrue;

3. The said burden of service and expense is not laid according to any rule whereby such burden

may be fairly and equitably apportioned among persons assumed to be benefited, or charged proportionally upon properties assumed to be enhanced in value;

4. The said burden of service and expense is a purely arbitrary exaction from a special class of persons and corporations, the basis of whose classification or selection sustains no legal, natural or reasonable relation to the purposes for which that exaction was made; and

5. Consequently, the exaction of service and expense attempted to be made by said Ordinance No. 95, if viewed as a special or local assessment, constitutes a taking of private property for public use without compensation, and therefore without due process of law, and also a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

It is settled by well considered decisions of the Supreme Court of California, of this Court, and other courts as well, that the power of the several States of the Union, and their municipal corporations and political subdivisions, to levy and collect special or local assessments is founded upon and limited by the existence of a special compensating benefit resulting to the owner of property benefited by the construction of some public improvement, to pay for which the assessment is levied.

The Supreme Court of California, in an extremely well considered opinion rendered in Spring Street

Co. v. Los Angeles, 170 Cal. 24, 28-30, expresses its conclusions upon this subject as follows, viz:

> "It will not be amiss here to consider briefly the nature of the power exercised by the legislature, and, under its direct authority, by its mandatories, in the matter of these so-called special assessments based on benefits. We need not be at pains to trace the development of the use of the power, nor yet is it important to refer it to any particular branch of the power of sovereignty—whether it be called the taxing power, the police power, or the power of eminent domain. Bearing in mind that with us all the power that any sovereign state ever possessed resides in the people acting through their legislature, saving as that power is controlled or restrained by the constitution, and as this power of sovereignty, excepting under the constitutional restraint, would permit, as was done in autocracies, the despoiling of the private citizen and the confiscation of his property, it is quite sufficient to refer to this fact for the origin of the power. Like numberless other powers which have in the past been exercised selfishly, cruelly, and unjustly, it is still a part of sovereignty, saving as it is denied, or repressed, or controlled, by the constitution. That in certain aspects it bears a likeness to taxation is unquestioned, in that it is a charge in terms of money based upon the real property of the owner, which the owner himself is compelled to pay, or in default risk the seizure and sale of his holdings. That in certain aspects it partakes of the nature of eminent domain is manifest from the fact that if a man may be compelled to expend one thousand dollars for the improvement of the street upon which his property happens to front, there is a certain taking of that one thousand dollars, for the public use. And, finally, that in other aspects it partakes of the nature of the exercise

of the police power is obvious when consideration is paid to the construction of public sewers, drainage districts and like works making for the benefit of the public health. Yet in no one, nor yet in all of these sovereign prerogatives can this particular power be said to rest under our form of government, since if it be said that a special assessment is in strictness a tax, it does violence to our constitutional provision touching the uniformity of taxation. If it be said that this power is referable to the sovereign prerogative of the right of eminent domain, the answer is that with us the state cannot exercise that power without compensation made to the owner of the property taken. And whatever might be said of the ability to refer an assessment for a drainage system to the police power, the argument would fail utterly when applied to the opening and widening of streets, to irrigation districts, desert land reclamation and similar forms of public control over lands privately owned. Indeed, to avoid doing violence to these constitutional limitations upon the power of the legislature, it must be held, as it has so often been held, that a special assessment is not, in the constitutional sense, a tax at all. It is 'a compulsory charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein, enhancing the present value of such real estate, and laid by some reasonable rule of uniformity based upon, in the ratio of, and limited by, such enhanced value'. (Hamilton on Law of Special Assessments, sec. 56.) The improvement must have a certain public character, and this we find conspicuously in street improvements, and less conspicuously in reclamation district assessments. Were it not for this recognized characteristic, it would be justifiable to order any owner of any vacant lot

to build thereon and to build a prescribed structure, since under the theory of benefits it could successfully be urged that the enhanced value of the land covers the cost of the structure compulsorily imposed upon it. It may be said that the interest of the public would demand that a building lot in the heart of a business district of a city should not be left vacant, its improvement tending to increase business and to enhance the values of surrounding property in which the public is interested. But so far such a public interest has not been considered adequate in support of such an exaction. That the return to the property owner by way of benefit is, under our system of government, the basic foundation upon which this right rests, becomes apparent from the consideration that if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal, and ununiform.

Therefore, the compensating benefit to the property owner is the warrant, and the sole warrant, for the legislature itself to impose the burdens of these special assessments."

In the case of Norwood v. Baker, 172 U. S. 269, 278-9, this Court declares the limitations upon the legislative power to levy and collect special or local assessments as follows, viz:

"Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements."

* * * * *

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without

> compensation. We say 'substantial excess', because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

In the case of Martin v. District of Columbia, 205 U. S. 135, this Court quashed a special assessment levied under authority of an Act of Congress, because that assessment was not limited to the benefits actually conferred on the lands subjected to the assessment, though it refrained from declaring the Act of Congress unconstitutional because, in its opinion, that Act permitted, if it did not require, "the interpretation that in any event the apportionment is to be limited to the benefit".

In the case of Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, this Court reversed a judgment of the Supreme Court of Louisiana which had sustained the validity of a special tax levied by a drainage district upon plaintiff's lands which it was admitted by the pleadings could not possibly be benefited in any respect by the construction of the drainage system for which the tax was levied. This decision proceeded upon the ground that the levy and imposition of the tax in question constituted a deprivation or confiscation of property in violation of the Fourteenth Amendment to the Constitution of the United States.

In the case of New York Life Insurance Company v. Prest et al., 71 Fed. 815, the Circuit Court of the

United States, in the Western District of Missouri, in an opinion in which it held void an ordinance of Kansas City providing for the assessment upon lands abutting upon the public streets of the cost of sprinkling such streets, uses the following language:

> "The sole foundation for the exercise of this extraordinary power (i. e., the power to levy special assessments for local improvements), so often pressed to the utmost verge of toleration by these municipal governments, rests on the fact or assumption that it operates in the nature of conferring a practical, permanent benefit upon the property itself, independent of any fancy, whim, or caprice of the occupant. The term, 'local improvements', on which the power asserted by this city charter is buttressed, had, at the time of the legislative grant, a well-known and sharply-defined meaning in law. As applied to a street, it meant the improvement of a street, as such, within the design of its creation, 'by reason of which the real property abutting or adjacent was especially benefited in its market value'. Cooley, Tax'n, 109, 110; Dill. Mun. Corp. 596, 597. Its exercise is inseparable from the idea and purpose of permanency, and must be of that character which, presumptively, works out an enhancement of the market value of the property assessed."
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> "This precise question has been considered and determined by the supreme court of Illinois in City of Chicago v. Blair, 149 Ill. 310, 36 N. E. 829. While it is to be conceded that, in some other jurisdictions, the contrary view has been expressed, the reason and authority of the Illinois court commands my entire approval. It holds that such an assessment as practiced by the city for street sprinkling was violative of fundamental law, because it is not predicable

of an improvement—a betterment—of the adjacent property. After showing that sidewalks and grading and paving of the streets do, in the experience of men, enhance the market value of contiguous lots, with pungent force the court observed:

> 'It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers, or by open air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of the grass upon the lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly the healthfulness, of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment.'"
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> * * * * *
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> "As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general, and not a special, burden."

It being clear that the burden of service and expense imposed by said Ordinance No. 95 involves

a taking of private property for public use, and that such taking is not compensated by any benefit peculiar to the companies owning or operating railways in the public streets of Sacramento or to their railway properties, said Ordinance No. 95, if considered as an exercise of the power to levy special assessments, will, if enforced, deprive plaintiff in error of its property without due process of law. For it is established by numerous decisions of this Court that any taking of private property for public use without compensation is a deprivation of property "without due process of law". It will be sufficient to refer, for a statement of this principle, to Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 238-9, 241.

It being a matter of common knowledge, and therefore one of which this Court may take judicial notice, that such benefit as naturally results from the sprinkling of public streets accrues not more to the owners of street railways than to the owners of the property abutting upon such streets and to the public using such streets for purposes of transportation and travel, it should require no argument to prove that said Ordinance No. 95, by imposing upon those who own or operate railways in the streets of Sacramento the burden and expense of sprinkling a great part of such streets while no corresponding burden is laid on the owners of such abutting property, denies, to plaintiff in error and others who own and operate street railways in Sacramento, "the equal protection of the laws" in vio-

lation of the Fourteenth Amendment to the Constitution of the United States. Indeed this is a far clearer case than that which was passed upon by the Supreme Court of New Hampshire in State v. Jackman, 69 N. H. 318; 41 Atl. 347. In that case, the Supreme Court of New Hampshire held to be unconstitutional and void an ordinance, enacted by the City of Concord pursuant to statutory authority, which, under penalty of a fine, imposed upon the tenant or occupant, or if no tenant, then upon the owner, of any lot of land bordering on any street where there was a sidewalk the obligation to remove all snow from the sidewalk adjoining his premises. In the course of its opinion, the Supreme Court of New Hampshire, after declaring that the burden imposed by said ordinance could not be sustained upon the principle under which special assessments are made for local public improvements, and that said ordinance was in substance and effect a law levying a tax, says:

> "But it makes no difference, so far as the decision of this case is concerned, whether the ordinance is or is not regarded as a law levying a tax. It undeniably imposes a duty and operates as a law creating a burden which does not bear upon all citizens alike, and which makes an unequal division of public expense among tax-payers, in direct violation of the principle of equality which pervades the entire constitution, and to which all other purposes are incidental and subordinate. State v. Pennoyer, 65 N. H. 113, 114; 18 Atl. 878. And not only is the ordinance a palpable violation of the equality of privilege and of burden guaranteed by

the constitution, but it is the taking of private property for public use, without just compensation, and a denial to the persons upon whom it operates of the equal protection of the laws, within the meaning of the fourteenth amendment of the federal constitution, providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisidiction the equal protection of the laws. See Smyth v. Ames, 18 Sup. Ct. 418, 424, 425. The amendment, however, 'adds nothing to the rights and liberties of the citizens of this state. It merely confirms to them by federal sanction the rights secured by the action of their ancestors a century ago. An enactment obnoxious to this provision of the national constitution is, in New Hampshire, no more ineffective than it would be in its absence'. State v. Pennoyer, 65 N. H. 115; 18 Atl. 880."

PROPOSITION NO. 3. SAID ORDINANCE NO. 95 IS NOT A CONSTITUTIONAL EXERCISE OF A RIGHT OR POWER INCLUDED IN THE POLICE POWER.

The position of the plaintiff in error is that said ordinance No. 95, even though enacted in the exercise of the police power for the preservation of the public health, is, nevertheless unconstitutional and void, because its enforcement will deprive plaintiff in error of its property without due process of law and deny to plaintiff in error the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. In support of this position, I submit the following:

(a)

The fact that said ordinance No. 95 was enacted by the City of Sacramento in the exercise of the police power of the State of California and professedly "for the immediate preservation of the public health" is not at all determinative of its validity, because the police power of the State of California is subject to, and controlled by, the limitations imposed upon the several States by the Fourteenth Amendment and other provisions of the Constitution of the United States.

The police power, as this court has often declared, is neither more nor less than the power of government inherent in every sovereign state, and includes the power to make and enforce, within its dominions, all laws which the sovereign deems to be necessary or proper to promote the public health, the public morals, the public peace, the public safety, the public convenience, and the public welfare.

But the people of the United States have imposed certain constitutional limitations, judicially enforcible, upon the sovereignty or governmental power and authority of the several states. Consequently, when the validity of a statute or an ordinance is drawn in question in this court on the ground of its repugnancy to the Constitution of the United States, it avails nothing to say that such statute or ordinance was enacted in the exercise of the police power of a state for the protection of the public health or for the accomplishment of any other legitimate object of government, if in fact such statute or ordinance is repugnant to the Constitution.

The Constitution of the United States, in prohibiting every state from passing "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts", and from depriving "any person of life, liberty or property, without due process of law", and from denying "to any person within its jurisdiction the equal protection of the laws", and in imposing other limitations on the powers of the States, makes no exception in favor of laws enacted in the exercise of the police power.

For a statement of the essential nature of the police power and the constitutional limitations upon its exercise, it will be sufficient to refer to the following cases, viz.:

The License Cases, 5 Howard 504, 583;

Lake Shore and M. S. Ry. Co. v. Smith, 173 U. S. 684, 688-9;

Chicago, B. & Q. Ry. Co. v. Illinois, *ex rel.* Grimwood *et al.*, 200 U. S. 561, 592-3, 600;

Grand Trunk W. Ry. Co. v. South Bend, 227 U. S. 544;

Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 595-6, 598, 604;

Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 499-501;

Atchison, Topeka and Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56, 58-9;

Minnesota v. Barber, 136 U. S. 313, 319-320; and

Buchanan v. Warley, 245 U. S. 60, 74-5, 81-2.

In the opinion of Mr. Chief Justice Taney, in the License Cases, *supra*, (p. 583) the following appears, viz.:

> "But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.
>
> "Upon this question the object and motive of the state are of no importance, and cannot influence the decision. It is a question of power. Are the states absolutely prohibited by the constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the state, or whatever the real object of the law; and it requires no law of congress to control or annul them."

In the case of Minnesota v. Barber, *supra* (p. 319), this court, speaking by Mr. Justice Harlan, said:

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

In the case of Lake Shore & M. S. Ry. Co. v. Smith, *supra*, (p. 689) this court, speaking by Mr. Justice Peckham, said:

> "The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. * * * * * * * * * * * *
>
> "This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a state directly and plainly violates a provision of the Constitution of the United States, such legislation would be void."

In the case of Chicago, B. & Q. Ry. Co. v. Illinois, *supra*, (pp. 592-3) this court speaking by Mr. Justice Harlan, said:

> "Private property cannot be taken without compensation for public use under a police reg-

> ulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. * * * The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner."

In the other cases cited above, the same principles are declared and applied in the determination of a variety of questions arising out of legislative acts which were enacted by states or their municipalities in the exercise of the police power and which were nevertheless determined by this court to be repugnant to some provision of the Constitution of the United States. Further quotation from authorities declaring or illustrating these principles seems unnecessary.

(b)

The said Ordinance No. 95, if enforced, will operate to deprive plaintiff in error of its property for public use, without compensation and, therefore, without due process of law, in violation of the Fourteenth Amendment.

Said ordinance No. 95 commanded, under penalty of fine or imprisonment, every corporation owning or operating any street railroad in Sacramento

> "to sprinkle with water the surface of the street, occupied by such railroad, between the rails and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation", all "without cost to the City." (Tr. p. 15.)

Compliance with this ordinance would have necessitated the expenditure by the plaintiff of not less than $2200.00 per year (Tr. p. 16), not for its own benefit, nor in the performance of any contract or obligation voluntarily entered into by it, but for the comfort, convenience and health of the inhabitants of Sacramento.

It cannot be doubted that to compel a corporation to pay out its own money in performing a service to the public is to take its property for public use, nor that the Fourteenth Amendment to the Constitution of the United States prohibits the states from taking private property for public use without just compensation. This is the basis of the decisions of this court in the following cases:

> Smyth v. Ames, 169 U. S. 466, 522-6;
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> Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585;
>
> Chicago, B. & Q. Ry. Co. v. Illinois, 200 U. S. 561, 592-3, 595; and
>
> Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235-9, 241.

In Chicago, B. & Q. Ry. Co. v. Illinois, *supra* (p. 595), Mr. Justice Holmes, in a concurring opin-

ion concurred in by the present Chief Justice and Mr. Justice McKenna, said:

> "I suppose it to be plain, as my brother Brewer says, that, if an expense is thrown upon the railroad unlawfully, its property is taken for public use without due compensation."

In the other cases cited above, it has been distinctly and definitely decided that any taking of private property for public use without the payment of just compensation is a taking without due process of law and a violation of the Fourteenth Amendment.

(c)

The said Ordinance No. 95, if enforced, will deny to plaintiff in error the equal protection of the laws in violation of the Fourteenth Amendment.

This ordinance imposes upon those who own or operate street and interurban railroads in the streets of the City of Sacramento the burden and expense of sprinkling, at their own cost, a large part, possibly all, of the streets occupied by their railroads. At the time when this ordinance was adopted and thereafter, the City of Sacramento provided for the sprinkling of all streets and parts of streets, except those which were required to be sprinkled by the owners or operators of railroads pursuant to said ordinance, and paid the cost thereof out of funds derived from general taxation. (Tr. p. 14) No owner of property abutting upon the streets was required to sprinkle any part of such

streets. With the exception of those specified in said ordinance, no person who used the streets and by his use thereof created and stirred the dust was required to sprinkle any part of said streets, or to contribute to the cost of sprinkling the same otherwise than by the payment of taxes. Thus the effect of this ordinance was to discriminate against, and to impose special burdens upon, plaintiff in error and other owners of street and interurban railroads. It is common knowledge that street and interurban cars running on fixed metal tracks do not grind up the earth and thereby create dust, nor do they stir the dust so much as automobiles, horses and horse-drawn vehicles. No special reason appears, therefore, why the owners and operators of street and interurban railroads should be singled out and commanded to sprinkle, at their own cost, the streets occupied by their railroads, when all other streets are sprinkled at public expense.

This case clearly comes within the rule declared by this court, in Atchison, Topeka and Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56, 59, that "the constitutional guaranty", i. e., the equal protection clause of the Fourteenth Amendment, "entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws", including laws enacted as police regulations.

The case of State v. Jackman, *supra*, from which I have already quoted in another connection, is very much in point here. In that case, the Supreme Court of New Hampshire held invalid, upon the

ground that it was a denial of the equal protection of the laws, a municipal ordinance which required the occupants of lots abutting on the public streets to remove snow from the sidewalks. In discussing this point, the court said:

> "It would seem unnecessary to go further; but the ordinance stands no better on the ground that it is an exercise of the police power inherent in all municipal and state governments, and which, it may be conceded, properly extends to 'the protection of the public morals, the public health, and the public safety.' Boston Beer Co. v. Massachusetts, 97 U. S. 25, 33; Mugler v. Kansas, supra. Nobody doubts that, when an occasion for its exercise exists, the police power may be invoked in behalf of these objects. But it is entirely plain that the ordinance has no real or substantial relation to any of them. It is not an exercise of restraining or protective power, like the 'Dog Law', so called, or the statute empowering towns to require buildings to be provided with such ladders and buckets as may be necessary for use in case of fire, under a penalty of six dollars for every three months' neglect, and other enactments of like character, cited by the state. It is simply an unequal division, for economy and convenience only, of public expense and public burden among a class of taxpayers who have not only once contributed and borne their full share agreeably to their constitutional duty, but who are again required to make contribution, not proportionately and according to the valuation of their property or the benefits they receive, but disproportionately, and solely according to the length of the street lines of their respective lots. This is extortion and inequality, pure and simple; and it is nothing else. See Curry v. Spencer, 61 N. H. 624, 631, 632. 'An act which operates on the

rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guaranteed to every subject.' Merrill v. Sherburne, 1 N. H. 199, 212.

"But suppose the legislature, in empowering the city of Concord to adopt the ordinance intended and understood it to be an act of the protective power, and that it may properly be so regarded; it is, nevertheless, such a manifest violation of rights secured to every citizen of the state by the fundamental law that it cannot be upheld. These rights are 'paramount to all governmental authority; and this constitutional principle has never been abandoned.' Wooster v. Plymouth, 62 N. H. 193, 200, and authorities cited. They are private rights of the subject, and not public rights of the state; and no legislature can invalidate or abridge them. A purely public burden cannot be laid upon a few individuals, as here attempted, by an ordinance or by any other enactment; nor can public expense be apportioned among them arbitrarily, disproportionally, and without regard to the value of their property; nor can they be subjected to double taxation in whatever form it may be disguised, or be held responsible for the action of the elements, which they could not control, and to the production of which they did not even theoretically contribute. It is true, nevertheless, that in several of the states all these things are held to be right and proper as a legitimate exercise of the police power (In re Goddard, Petitioner, 16 Pick. 504; Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480), or the power to remove nuisances (Mayor, etc. v. Maberry, 6 Humph. 368). But even the police power, comprehensive as it admittedly is, has its limitations; and in this state at least, it is subordinate to the equality of privilege and of burden secured by the bill of rights and guaranteed by

the constitution, in clearly expressed provisions which mean just what they declare. And in the proposition that, in the exercise of a power to remove nuisances, a private individual may be compelled to remove an obstruction to travel which he did not create, from premises over which he has no control, and which it is the statutory duty of the municipality to keep free from obstruction, we fail to discover any merit except that of novelty."

Another case equally in point is Wilson v. United Traction Co., 76 N. Y. Supp. 203; 72 App. Div. 233. In this case, the court held unconstitutional and void a statute imposing on street railroad companies the duty of transporting policemen free of charge. In the course of its opinion, the court said:

"It is sufficient to say that, in our judgment, the statute in question cannot be sustained as a valid exercise of that power. Its evident purpose and effect is to relieve the municipalities referred to therein from a portion of the burden of maintaining their police and fire departments at the expense of the several street railway companies within their limits. Concede that the public safety requires that the public officers mentioned be carried upon such railroads, it is not apparent why, in order to promote that safety, they should be carried free of charge. There is no pretense that the act is necessary to secure their right to ride upon such roads. The sole purpose is to secure their right to ride free. Thus the only advantage secured by the act to the public is that the railroad company, instead of the municipality, pays the fare. Such an advantage may be a public convenience; but the right to take the property of the individual citizen, or of a class,

> for the sole reason that the proceeds of it would be convenient to aid the municipality in defraying its general expenses, has not yet been conceded as a legitimate exercise of the police power, and we are not disposed to concede it now."

The real purpose of the City of Sacramento in enacting said Ordinance No. 95 was to compel the plaintiff in error and other owners of street and interurban railroads to bear the expense of sprinkling the streets occupied by their respective railroads and, by that means, to relieve the taxpayers of the burden of that expense. The professed object of preserving the public health could have been accomplished quite as well by the sprinkling of those streets at public expense as by the sprinkling of them by the owners of street and interurban railroads at their own private expense.

CONCLUSION.

Said Ordinance No. 95 having been enacted, not in the exercise of any right or power founded upon contract nor any right or power inherent in the power to levy and collect taxes and local assessments, but in the exercise of the police power, is unconstitutional and void for the reason that, if enforced, it will operate to deprive plaintiff in error of its property without due process of law, and, by imposing unequal, unjust and unlawful burdens upon plaintiff in error, will deny to the latter the equal protection of the laws, in violation of the pro-

visions of section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore the plaintiff in error respectfully submits that the judgment of the District Court of Appeal, in the Third Appellate District of the State of California, ought to be reversed.

Dated, San Francisco,
October 1, 1919.

WM. B. BOSLEY,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
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CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1919

PACIFIC GAS AND ELECTRIC COMPANY,
Plaintiff in Error.

vs.

THE POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, and HON. J. J. HENDERSON, Judge thereof, et al.,
Defendants in Error.

No. 31

In Error to the District Court of Appeal, Third Appellate District, of the State of California.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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In Error to the District Court of Appeal, Third Appellate District, of the State of California.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for defendants in error, if I correctly understand their argument, rest their defense on two propositions, viz:

(1) The District Court of Appeal in the Third Appellate District of the State of California did

not have jurisdiction to review on a writ of certiorari the judgments of the Police Court and Superior Court by which plaintiff in error was convicted and fined for violating Ordinance No. 95, Third Series, of the City of Sacramento, and therefore should have dismissed plaintiff in error's petition on that ground and thus have avoided the necessity of rendering a decision upon the Federal questions which afford the only ground for invoking the jurisdiction of this Court; and

(2) Ordinance No. 95, Third Series, of the City of Sacramento, by which street and interurban railroad companies are required to sprinkle at their own cost the streets occupied by their railroads so as to keep the dust from arising while their cars are in operation, was a constitutional exercise of the police power vested in said city.

JURISDICTION.

In reply to the first of these propositions, it should be sufficient to say that the said District Court of Appeal actually took jurisdiction of the case, decided it upon the merits, and thus, by necessary implication, decided that it possessed complete jurisdiction of the parties, the action, and the subject of the action; for, upon the authority of many well considered decisions of this Court, of which it will be sufficient to refer to Old Colony Trust Company v. City of Omaha, 230 U. S. 100, 116, and Dayton Coal and Iron Company v. Cincinnati, N. O. and T. Pacific

Railway Company, 239 U. S. 446, 450, the decision of said District Court of Appeal upon the question of its jurisdiction, resting solely upon the construction and interpretation of the Constitution and statutes of the State of California, is to be accepted as conclusive by this Court. The decision of said District Court of Appeal upon the question of its jurisdiction, whether one way or the other, could not have involved any infraction or denial of any right under the Constitution of the United States. Said District Court of Appeal having decided that it possessed the requisite jurisdiction, and having exercised that jurisdiction to determine the action upon the merits, the plaintiff in error sued out a writ of error from this Court to said District Court of Appeal. If said District Court of Appeal had dismissed the action on the ground of its want of jurisdiction, the plaintiff in error would have been entitled to sue out a writ of error from this Court to the Superior Court, one of the defendants in error, as "the highest Court of the State in which a decision in the suit could be had" pursuant to section 237 of the Judicial Code.

Said District Court of Appeal, as appears by its opinion printed in the transcript of record on pages 34 et seq., instead of dismissing plaintiff in error's petition for a writ of certiorari on the ground of its want of jurisdiction, rendered its decision sustaining the judgment of conviction and discharging the writ of certiorari upon the sole ground that said Ordinance No. 95 was a valid exercise of the police

power vested in the City of Sacramento. The District Court of Appeal, it is true, did not expressly declare that said Ordinance was repugnant to the Fourteenth Amendment to the Constitution of the United States. But the necessary effect of the judgment of said District Court of Appeal was to sustain the validity and constitutionality of said Ordinance No. 95, which plaintiff in error had drawn in question on the ground that it was repugnant to the provisions of said Fourteenth Amendment; for, if said Ordinance No. 95 was void for repugnancy to the Constitution of the United States, the alleged misdemeanor for the commission of which plaintiff in error was convicted was nonexistent, and the judgments of said Police Court and Superior Court, defendants in error, should have been set aside and annulled because no Court possesses jurisdiction to convict any person of a crime which has no existence under the law.

Ex parte Siebold et al., 100 U. S. 371;
Ex parte Hodges, 87 Cal. 162, 165.

The case being as I have stated, it is plain that this Court has jurisdiction to reexamine and affirm or reverse the judgment of said District Court of Appeal. Authorities fully supporting this position are cited on page 8 of the opening brief filed herein on behalf of plaintiff in error.

THE POLICE POWER.

Counsel for defendants in error have not attempted to support the validity of the aforesaid

Ordinance No. 95 on the ground that its enactment was an exercise of any right or power founded upon contract, or upon the ground that its enactment was an exercise of the power to levy and collect taxes. They have not denied that the real purpose of the enactment of the said Ordinance was to compel street and interurban railroad companies to perform, at substantial cost to themselves, a service for the public benefit, and by that means to shift, from the City of Sacramento and its tax payers to such railroad companies, a substantial part of the public burden of sprinkling the public streets in the City of Sacramento. They have not denied that the natural and necessary effect of said Ordinance, if, and when, it shall be enforced, will be to take for public use, without any compensation whatever, a substantial amount of the property of the plaintiff in error and other street and interurban railroad companies. They have not denied that no burden corresponding to that imposed by said Ordinance upon street and interurban railroad companies has ever been laid by the City of Sacramento upon other persons and corporations who, by their use of the public streets, contribute to an equal or greater extent to the making and stirring of the dust which is claimed to be injurious to the public health. They have not contended, nor is there anything in the record in this case tending to show, that plaintiff in error's railroad, because of the manner of its construction or operation, has in any respect, or to any extent, increased either the difficulty or the expense of sprinkling, and thereby

laying the dust in, the public streets in the City of Sacramento.

Counsel for defendants in error, tacitly admitting that the real purpose of the legislative body of the City of Sacramento in enacting said Ordinance No. 95 was to shift a substantial part of the public burden of sprinkling the streets from the City of Sacramento and its tax payers to the street and interurban railroad companies—a burden which such companies had not obligated themselves by contract to assume and which the City of Sacramento was without power to impose upon such companies by levying and collecting taxes—rest their defense of the constitutionality of said Ordinance No. 95 solely upon the ground that said Ordinance is a valid exercise by the City of Sacramento of its police power for the preservation of the public health.

In support of their position counsel for defendants in error have cited and quoted from many cases in which the constitutionality of divers statutes and ordinances enacted in the exercise of the police power has been sustained and which serve to illustrate the vast extent of this power. In passing, it can hardly be out of place to comment upon the fact that these cases, in addition to illustrating the extent of the police power, exhibit an almost incredible confusion of thought concerning the nature of this power and its relation to the limitations and restrictions which the people of this country have imposed by the Federal and State Constitutions upon the powers conferred by them upon their governmental agencies.

This manifest confusion of thought leads me to elaborate, but with as much brevity as possible, the subject which I discussed on pages 39 to 43 of my opening brief on behalf of plaintiff in error.

A careful consideration of the many decisions of this Court dealing with the subject of the police power, including particularly the cases cited on page 40 of my opening brief and certain additional cases which I shall cite as my argument proceeds, has led me to the following conclusions, viz.:

(a) The police power, when used in its broadest sense, is simply the power of government residing in every sovereign state, i. e., the power to create, define and limit the political or legal rights and duties of human beings living in an organized civil society or state, and to control and regulate the conduct of such human beings in the exercise and enjoyment of their rights and the performance of their duties. So defined, the police power embraces the power of eminent domain, the power to coin money, the power to levy and collect taxes, the power to make war, the power to provide for the common defense, the power to regulate commerce, the power to create courts and to provide for the adjudication of controversies, and all of the other powers which, by reason of their having been the subject of special legislation from time immemorial or by reason of their having been made the subject of special grants or limitations and restrictions in the Federal and State Constitutions, have come to be classified and given distinctive names by Courts

and the authors of legal treatises, and also embraces the great unclassified residuum of governmental power inherent in the legal conception of sovereignty.

The License Cases, 5 How. 504, 583;
Lake Shore and M. S. Ry. Co. v. Smith, 173 U. S. 684, 688-9;
New York v. Miln, 11 Peters 102, 139.

(b) The term, "police power", is sometimes used as embracing only the unclassified residuum of governmental power to which reference has just been made.

(c) The term, "police power", is perhaps more frequently used in a still narrower sense as embracing the power to make and enforce laws the object of which is so to control and regulate the conduct of human beings that they, in the exercise and enjoyment of their constitutional and legal rights with respect to life, liberty and property and in the performance of their constitutional and legal duties, shall avoid doing injury and causing damage to others:

Munn v. Illinois, 94 U. S. 113;
Richmond, Fredericksburg and Potomac R. R. Co. v. City of Richmond, 96 U. S. 521, 528-9.

(d) When the validity of a law is drawn in question on the ground of its being repugnant to the Constitution of the United States, the question of its validity ought to be determined solely with reference to its consistency with, or repugnancy to,

that Constitution, even if it appears to have been enacted in the exercise of the police power as defined in paragraph (c) above. This proposition is abundantly supported by the cases cited on page 40 of my opening brief.

(e) In cases involving the validity of a statute enacted for the purpose of promoting and protecting the public health, morals, peace, safety, convenience and welfare and of applying and enforcing the principle embodied in the maxim, *sic utere tuo ut alienum non laedas,* the real difficulty is to determine whether the natural and necessary effect of the enforcement of such statute will be simply to compel those coming within the scope of its operation so to exercise their own constitutional and legal rights as to avoid infringing upon the like rights of others and thereby causing them to suffer damage, or will be to impair the obligation of a contract, to deprive some person of property for the private use of another or for the public use without compensation, to deprive some person of life or liberty without due process of law, to deny to some person or class of persons the equal protection of the laws, or otherwise to infringe upon some right granted or protected by the provisions of the United States Constitution.

Once it is determined that the statute whose validity is in question is not a legitimate exercise of the police power as defined in paragraph (c) above, but, on the contrary, will, by its necessary operation, if enforced, be destructive of rights granted or secured

by the Constitution of the United States, this Court does not hesitate to declare it void for repugnancy to that Constitution. The truth of this statement is well illustrated by the decision of this Court in Buchanan v. Warley, 245 U. S. 60, wherein an ordinance prohibiting, under certain conditions, the occupancy by a negro of any house upon a block upon which the greater number of houses are occupied by white persons, was held to be repugnant to the Fourteenth Amendment to the Constitution of the United States. In the course of its opinion in this case this Court said (pp. 73-4):

> "This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.
>
> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety, and welfare is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution;

> that principle has been so frequently affirmed in this court that we need not stop to cite the cases.
>
> "The Federal Constitution and laws passed within its authority are, by the express terms of that instrument, made the supreme law of the land."

Further on in its opinion in Buchanan v. Warley, *supra,* this Court disposing of the argument that the segregation of races intended to be promoted by the aforesaid Ordinance of the City of Louisville would promote the public peace by preventing race conflicts, said (p. 81):

> "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

On the other hand, if it is determined that the statute whose validity is drawn in question is a legitimate and reasonable exercise of the police power as defined in paragraph (c) above, that is to say, a statute the natural and necessary effect of the enforcement of which will be simply to compel those coming within its operation to exercise their own rights under the Constitution and laws of the land in such manner as to avoid injury to other individuals and detriment to the public, then the fact that enforcement of the law involves some restriction of the individual's freedom of conduct or some limitation upon his use and enjoyment of his property, or will subject him to substantial expense by compelling alterations in structures or the instal-

lation of safeguards, or will subject him to loss by prohibiting him from continuing to conduct by means of his property some special kind of business deemed inimical to the public welfare, e. g., the manufacture and sale of alcoholic liquors, will not be deemed by this Court to be a sufficient ground for holding such statute repugnant to the Fourteenth Amendment to the Constitution of the United States. This is the principle which governed the decisions of this Court in New York and New England R. R. Co. v. Bristol, 151 U. S. 556; Minneapolis and St. Louis Railway Co. v. Emmons, 149 U. S. 364; Chicago B. & Q. R. Co. v. Nebraska, 170 U. S. 57; Mugler v. Kansas, 123 U. S. 623, which are cited in defendant in error's brief; Missouri Pacific Ry. Co. v. City of Omaha, 235 U. S. 121, and other cases too numerous to mention.

The cases involving the constitutionality of statutes enacted in the exercise of the police power, as defined in paragraph (c) above, may conveniently be divided into three classes as follows, viz.:

(1) Cases involving statutes whose constitutionality is drawn in question upon the ground that the direct object of their enactment and enforcement, whatever may have been the motive of the Legislature in enacting it or the indirect results intended to be accomplished by it, is one whose accomplishment is prohibited by the Constitution of the United States. To this class belongs the case of Buchanan v. Warley, *supra*.

(2) Cases involving statutes whose constitutionality is drawn in question upon the ground that, even though the object sought to be accomplished by their enactment and enforcement is legitimate and meritorious and even though the means provided for the accomplishment of such objects do not in principle come within any express prohibition of the Constitution of the United States, nevertheless they impose restrictions and burdens upon individuals in the exercise and enjoyment of their liberty or in respect to their use and enjoyment of property so unreasonable and oppressive as to be tantamount to a deprivation of liberty or property without due process of law. To this class belong the case of Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121, and the other cases referred to above as having been cited in the brief of defendant in error. In this class of cases the constitutionality of the statute is generally sustained, though in extreme cases such a statute or an administrative order made pursuant thereto may be declared void. See

Washington ex rel. Oregon R. & N. Co. v. Fairchild et al., 224 U. S. 510.

(3) Cases involving statutes whose constitutionality is drawn in question on the ground that however legitimate and proper may be the ultimate object sought to be accomplished by their enactment and enforcement the means employed to accomplish that object involve the taking of property from the owner for the private use of another, or the taking of private property for public use with-

out just compensation, or a denial of the equal protection of the laws, or an infringement of some other right secured by the Constitution of the United States. This class includes such cases as

Minnesota v. Barber, 136 U. S. 313;

Missouri Pac. Ry. Co. v. Nebraska, 164 U. S. 403;

Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196;

Great Northern Ry. Co. v. Minnesota, 238 U. S. 340;

Chicago, M. and St. Paul R. Co. v. Wisconsin, 238 U. S. 491.

In the case at bar the District Court of Appeal, in the Third Appellate District, of the State of California, in its decision printed in the transcript of record, held in effect that said Ordinance No. 95 of the City of Sacramento was a legitimate and proper exercise of the power to compel street and interurban railroad companies, in the operation of their respective railroads in the public streets of Sacramento, to observe and comply with the principle expressed in the maxim, *sic utere tuo ut alienum non laedas*. Similar decisions have been rendered by the highest Courts of several other states and, upon the authority of such decisions, the authors of several well known legal treatises have stated the rule to be that municipal ordinances requiring street railroad companies to sprinkle those parts of public streets which are occupied by their railroads are constitutional and valid. Reference to these decis-

ions and treatises is made in defendant in error's brief on pages 19 et seq.

Notwithstanding the authorities relied upon by counsel for defendants in error, I respectfully submit that the Courts which have sustained the validity of such ordinances, in the absence of any contractual obligation on the part of the street railroad companies to sprinkle the public streets at their own expense, have fallen into the error of assigning such ordinances to the same category as the statutes whose validity was involved in the cases belonging to the second class to which I have just referred.

Upon principle I think that Ordinance No. 95 whose constitutionality is drawn in question in the case at bar, is in the same category as the statutes involved in the third class of cases mentioned above. The reasons for this opinion are as follows, viz.:

(1) Said Ordinance No. 95 of the City of Sacramento, if enforced, will deprive plaintiff in error and other street and interurban railroad companies operating railroads in the public streets of the City of Sacramento of their property without due process of law by compelling them to expend their money in substantial amounts, not pursuant to any contractual obligation, not for the purpose of so using their own property and exercising their own rights as to avoid private injury to other persons or public detriment, not for the purpose of remedying or abating an inconvenience, evil or nuisance

for the creation, maintenance or existence of which they are in any proper sense specially or peculiarly responsible, but for the purpose of remedying a public inconvenience, evil or nuisance which owes its existence in part to climatic and other natural conditions and in part to the common and general use of the streets of the City of Sacramento by the general public.

(2) Said Ordinance No. 95, if enforced, will deny, to the plaintiff in error and other street and interurban railroad companies operating railroads in the streets of the City of Sacramento, the equal protection of the laws, because it arbitrarily singles out such street and interurban railroad companies as a special class and imposes upon them the burden of sprinkling at their own substantial cost a large part of the public streets occupied by their respective railroads, for the purpose of remedying and abating an inconvenience, evil or nuisance which, as I have said, owes its existence in part to climatic and other natural conditions and in part to the common use of the public streets by the general public, while the expense of sprinkling all other public streets and parts of streets in the City of Sacramento for the purpose of remedying the same evil is paid by the said City of Sacramento out of its revenues raised by general taxation and is thus apportioned among the entire body of tax payers in said city. The discrimination effected by the enactment and enforcement of said Ordinance No. 95 is arbitrary and unreasonable, (a) because street and

interurban railroad companies do not contribute to the evil sought to be remedied as much as, certainly not more than, other persons who use the same public streets, and (b) because neither the existence, the manner of construction nor the mode of operation of such street and interurban railroads has in any respect or to any extent increased either the difficulty or the expense of sprinkling and thereby laying the dust in the public streets in which they are constructed. In support of this proposition I rely upon the cases cited on pages 46 to 49 of my opening brief.

Wherefore, on behalf of plaintiff in error, I respectfully submit that the judgment brought before this Court for review in this case ought to be reversed.

Dated, San Francisco,
November 15, 1919.

WM. B. BOSLEY,
Attorney for Plaintiff in Error.

Due service and receipt of a copy of the within is hereby admitted

this ..... *day of November, 1919.*

City Attorney, City of Sacramento,

Assistant City Attorney, City of Sacramento,

Attorneys for Defendants in Error.

FILED
NOV 5 1919
JAMES D. MAHER,
CLERK

No. 31

In the Supreme Court

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OCTOBER TERM, 1919.

PACIFIC GAS AND ELECTRIC COMPANY
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Defendants in Error.

In Error to the District Court of Appeal, Third Appellate District of the State of California.

Brief For Defendants In Error

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City Attorney and Attorney for Defendants in Error and Hugh B. Bradford, Attorney for Superior Court of the State of California in and for the County of Sacramento.

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Brief For Defendants In Error

History of Case.

Plaintiffs in error, a corporation owning and operating a street railway system in the City of Sacramento, California, under certain franchises granted to plaintiff or its predecessors at divers times by the authorities of the city—was charged with the viola-

tion of an ordinance of the City designated as "Ordinance No. 95 Third Series," requiring Plaintiff and all other street railways, operating upon and along the streets of the City, to sprinkle the surface of the streets occupied by such Railroads, etc., a true copy of said ordinance, omitting the title, is as follows:

Be it ordained by the City Commission of the City of Sacramento, as follows:

Section 1. Every person, firm or corporation owning, controlling or operating any street railroad, suburban railroad or interurban railroad upon and along any of the streets of the City of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation.

Sec. 2. The sprinkling required by the provisions of Section 1 of this ordinance shall be done under the general supervision of the Superintendent of Streets, and such work shall be performed only between the hours of nine (9) o'clock p. m. and seven (7) o'clock a. m., unless otherwise directed by said Superintendent of Streets. The water used for sprinkling said streets may be taken from the city water system without charge; provided, that general care must be exercised in cupling hose to the hydrants so that injury to the same may be avoidable; and provided, also, that when a fire alarm is sounded all hydrants must be instantly closed and must not be re-opened un-

til the signal indicating that the fire has been extinguished is given.

Sec. 3. In the sprinkling of streets, as required by this Ordinance, oil macadam streets and streets paved with asphalt shall be lightly sprinkled, but all other streets shall be thoroughly wet.

Sec. 4. A violation of any of the provisions of this ordinance shall be and constitute a misdemeanor and shall be punishable by a fine of not to exceed five hundred ($500) dollars, or by imprisonment in the City Jail for not to exceed six months, and for each day any such person, firm or corporation shall fail, refuse or neglect to sprinkle said streets, as in this ordinance provided, such person, firm or corporation must pay to the City of Sacramento as liquidated damages the sum of two ($2.00) dollars for each mile of street so left unsprinkled.

Sec. 5. This is an ordinance for the immediate preservation of the public health, and is hereby declared to be an urgency measure and shall be in full force and effect from and after its passage.

Passed June 19th, 1913.

M. J. BURKE,
President of the City Commission.

Attest:
M. J. DESMOND, City Clerk.

After trial Plaintiff was convicted for such violation and was fined by the Police Court of the City of Sacramento in the sum of $400.00. Plaintiff appealed from the judgment of the Police Court to the Superior Court of the State of California in and for the County of Sacramento, and said judgment of the Police Court was confirmed.

Plaintiff in error herein then took an appeal from

the judgment of the Superior Court affirming the judgment of the Police Court to the Supreme Court of the State of California, which appeal was dismissed by the Supreme Court on the ground that no appeal lay from the judgment of the Superior Court.

Plaintiff in error then petitioned the said District Court of Appeal for a writ of Certiorari to which petition Respondents demurred on the following grounds:

1st. That the facts stated in the petition were not sufficient to constitute a cause of action.

2nd. That said Court of Appeal did not have jurisdiction either of the persons of the Respondents therein or of the subject of the action or proceeding. (Tr. pages 31 to 33) and moved the Court to dismiss the petition and after hearing, the said District Court of Appeal without passing directly upon the question of jurisdiction proceeded to decide the case on the merits and held Ordinance No. 95 was a valid exercise of the Police power of the State of California vested in the City of Sacramento and entered judgment against the Plaintiff in error herein and in favor of Defendants in error herein, discharging and denying the Writ of Certiorari. (Tr. pages 33-40), Pacific Gas and Electric Company vs. Police Court et al., 28 Cal. Appellate Reports Page 412. Plaintiff in error thereupon applied to the Supreme Court to have the case heard and determined by it, but the Supreme Court made an order denying the application and caused a copy of said order to be filed with the Clerk of the District Court of Appeal and the same became a final judg-

ment (Tr. page 41, Constitution of California, Art. VI, Sec. 4).

Plaintiff thereupon appeals to this Honorable Court to obtain a review of the said judgment of the District Court of Appeal discharging and denying the writ of certiorari for which Plaintiff in error had applied.

Defendants are still of the opinion that demurrer should have been sustained and the motion to dismiss granted upon the strength of the following authorities which would have disposed of the case in another way, but Defendants are equally as content to accept the determination of the Court upon the merits and feel confident of the soundness of the Court's judgment on the merits of the case as to the validity of the ordinance upon which the action was based.

Points and Authorities on the Demurrer and Motion to Dismiss Petition.

"The writ of certiorari will not lie to determine the validity of a municipal ordinance properly involved in an appeal taken to the Superior Court from a judgment of conviction of a violation thereof in the Police Court which has been affirmed upon said appeal. The writ only lies where there is no remedy by appeal, and will not lie either where such remedy has been lost by laches or where the judgment has been confirmed upon appeal."

W. D. Valentine, et al., Appellants, vs. Police Court of the City and County of San Francisco, etc., Respondents, 141 Cal., 615.

American Law Book Company, Petitioner, vs.

Superior Court of the State of California, in and for the County of Santa Clara, et al., 164 Cal., 327.

A. D. Green, Respondent, vs. George A. Rogers, Justice of the Peace in and for Gridley Township, County of Butte, 18 Cal., App., 572.

Ordinance Requiring Street Car Companies to Sprinkle Streets.

POLICE POWER.

It is generally held that municipalities have the right to exercise police power within their territorial limits. In California this right is insured by an express provision of the Constitution.

"Art. XI. Section 11. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with the general laws."

This power is as old as the common law itself, and was laid down by Chief Justice Wray in the William Alvred's case, 9 Cope, 59 (1611).

> "If action lies for stopping wholesome air, a fortiori an action lies in the case at bar for infecting and corrupting the air. And the building of a lime kiln is good and profitable, but if it be built so near a house that, when it burns, the smoke thereof is so great that none can dwell therein an action lies for it. This stands with rule and reason. Et sic utere tuo ut alienum non laedas. Use your own property in such a manner as not to injure that of another."

Pond on Public Utilities. Section 93. "Especial franchise privileges, when accepted and acted

upon by a corporation, constitutes a contract equally binding upon the state and the municipality, and creates a vested property interest which cannot be impaired or destroyed, unless the power to do so is reserved as a condition of the grant, **except** insofar as the police power permits of the regulation of the use and enjoyment of the right **so** granted in the interest of the public health and general welfare to which the exercise of all powers and the enjoyment of all rights are naturally subject."

Richmond Railroad Co. vs. Richmond, 96 U. S., 521. "The power to govern implies the power to ordain and establish suitable police regulations. And that itself has often been decided, authorizes municipal corporations to prohibit the use of locomotives in public streets when such action does not interfere with vested rights. Such prohibitions clearly rest upon the maxim: 'Use your own property in such a manner as not to injure that of another.' It lies at the foundation of police power. It is not for us to determine whether the power is justly exercised. Our duty is at an end when we find that it exists. Judgment of the court below is final as to the reasonableness of the counsel."

In Re Montgomery, 163 Cal., 457. "The legislative body of the city having a freeholders' charter cannot be limited by a charter provision in the exercise of the police power granted to it by the constitution. The city, under such constitutional grant, has the right to exercise the whole police power of the state so far as local regulations are concerned, subject only to the general laws."

Elliott, Roads and Streets. Section 84, 85. "All rights of property, whether held by citizens or corporations are subject to the governmental power commonly called police power. Police power exists without any reservation in the constitution, and it is one that cannot be surrendered, so **franchises of private corporations must be con-**

clusively presumed to be acquired with reference to its existence."

In Re Jules Junqua, 10 Cal. App., 602. "The defendant was convicted of a misdemeanor for violating Ordinance No. 839 of the City of Sacramento, making it unlawful for anyone to permit soot to escape from a crude oil furnace. It was contended that the ordinance was void, as the Legislature could not confer power on City Trustees to declare that a nuisance which is not a nuisance per se. It was also contended that the ordinance was unconstitutional because it provided for taking property without due process of law.

Discussion of Police Power.

"Police power is an inherent attribute of every state or commonwealth. Its exercise is indispensable to health, peace, comfort of the inhabitants. The People, through their constitution, expressly conferred its exercise on cities. The city may make and enforce regulations necessary for health, comfort and happiness. The only limit is that it shall not be in conflict with the general laws. It may regulate any class of business which may, in the judgment of local authorities, interfere with the rights of others. The exercise of police power is not confined to nuisances. The old charter of the City of Sacramento gave the Board of Trustees power to determine what are nuisances, and to prevent the same. The legislature has the right to delegate such authority. But an exercise of police power which imposes unnecessary and unreasonable burdens will not be sustained. The action of the legislative body in the exercise of police power will be reviewed by the courts. The courts will not interfere unless it is plain that needless oppression is worked and constitutional rights invaded. The courts

will admit evidence to show that an ordinance is in fact unreasonable and oppressive, though apparently not so on its face. An ordinance regulating the escape of soot is not on its face unreasonable. From the fact of the passage of the ordinance and in the absence of evidence showing the contrary, we must assume that the governing body of the City of Sacramento had determined that soot from chimneys has a deleterious effect. The city has power to regulate the subject matter, and nothing objectionable appears upon the face of the ordinance, and nothing is presented outside the measure to show an invasion of rights. The judgment was within the jurisdiction of the court." Pacific Gas and Electric Company vs. the Police Court of the City of Sacramento, et al., 28 Cal. App. Reports, page 412.

In re Sam Chung, 11 Cal. App., 517. "But where no prohibition is sought, but only regulation, which we must assume the evidence before the council demonstrated to be in furtherance of a beneficient design to contribute to the welfare of the community. Under such circumstances, if they exist, the abstract right of the individual to pursue any lawful occupation where it can be most conveniently and advantageously carried on must yield to the superior right of the public to be protected from the menace of disease. Such legislation indeed is one of the beneficient products of modern advancement in sanitation. It is sanctioned by the most enlightened public health, and it reflects the principle of sound, scientific hygiene. It is on the same footing as legislation requiring streets to be kept clean, garbage properly removed, and air pollutions of all kinds prevented, whether they arise from smoke, street dust, noxious gases or other sources. Formerly such legislation would have been regarded as an unwarranted encroachment upon the rights of the individual, but in view of the progress of the medical profession, the better understanding of

the nature of the disease and its transmission, and the broader conception of the duty of the municipality in regard to the preservations and protection of the public health characteristic of the present age, it seems upon its face to embody a sensible and reasonable restriction, bearing a direct and efficacious relation to the accomplishment of a legitimate purpose of police and sanitary legislation. At least, in the absence of any evidence to that effect, we cannot say that the public health is not thereby promoted or that the method adopted is therefore unreasonable and unnecessarily oppressive. It cannot be held that he has any just cause for complaint."

New York and New England Railroad Co. vs. Bristol, 151 U. S., 556, 567.

The court approved the holding of the court from which the case has been appealed in holding that grade crossing were of the nature of nuisances which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part or all of the expense of such abatement. It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts or the deprivation of property without due process of law, or of the equal protection of the laws, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted in the use of property be withdrawn from the liability of governmental regulation in particulars essential to the preservation of the community from injury.

See also

Beer Co. vs. Massachusetts, 97 U. S., 25,
Fertilizing Co. vs. Hyde Park, 97 U. S., 659,
Barbier vs. Connelly, 113 U. S., 27,
New Orleans Gas Co., vs. Louisiana Light Co., 115 U. S., 650,
Mugler vs. Kansas, 123 U. S., 623,
Budd vs. N. Y., 143 U. S., 517.

Minneapolis and St. Paul Ry. Co., vs. Emmons, 149 U. S., 364 and 367. "It was objected that the statute requiring the railway company to build fences for the benefit of the adjacent land owners or to pay damages if not built, imposed upon the company a duty not required by contract, by law, or its charter, and is therefore a violation of a right conferred by the charter to buy and hold lands for a specified purpose the same as any other land buyer. To this position, we answer that the extent of the obligations and duties required by the charter of railway corporations does not create any limitations upon the state against the state imposing all such further duties as may be deemed essential and important to the safety of the public. Imposing proper penalties for the enforcement of such additional duties is unquestionably within the powers of the state in this respect."

Southern Pacific Co. vs. the City of Portland, 177 Fed., 598 (1910). "I conclude, therefore, that the legislation complained of (prohibiting the use of steam locomotives on certain streets) is valid, because within the powers reserved to the city by the ordinance under which the plaintiff is now using the street, but if I am mistaken in this view, it is still, in my opinion, valid because, within the general police power of the city. The grant, permission, license or authority, or whatever it may be called, to plaintiff to occupy the

street for railway purposes was necessarily made and accepted subject to the right of the city under its police power to make such regulations concerning the use thereof as the public safety and welfare might, from time to time, require. The legitimate exercise of legislative power in securing the public safety, health and morals is not within the inhibitions of the federal constitution against the impairment of obligations of contracts, the deprivation of property without due process of law, or the equal protection of laws. Every grant, therefore, of a public franchise or right is subject to the legitimate exercise of police power by the state or municipality."

Collins vs. Lean, 68 Cal., 284, 287. "It is permanently settled by the law that all rights or property are held subject to such reasonable and proper control of the mode of keeping and use as may be necessary for and in consonance with the welfare of the public. Certain kinds of property, when held or used so as to be injurious to the general public, may be seized and destroyed."

Mayor and City Council of Baltimore vs. Baltimore Trust & Guarantee Company, 166 U. S., 673. "Right of Street railway company to lay tracks in streets—restriction—compensation for taking up tracks—right to use street:

"1. The right of a street railway company under an ordinance granting permission to lay tracks in streets is subject to reasonable regulations by subsequent ordinances as to the use of streets.

"2. An ordinance restricting a street railway company to a single track for 1,000 feet in a narrow and busy thoroughfare is not an unreasonable restriction of its rights, or a material modification of a prior ordinance granting the company permission to lay double tracks in the streets for many miles.

"3. Failure to provide any compensation to a

street railway company for taking up one track in a street in which it has laid double tracks does not make the ordinance unreasonable, if the double tracks were laid, except for a few hundred feet, after notice from the mayor and the city solicitor that there was objections to the double tracks, and that an ordinance was to be introduced to limit the road at that place to a single track."

Chicago, B. & Q. R. Co. vs. State of Nebraska, 170 U. S., 68. "R. R. Co. and City of Omaha entered into an agreement whereby the R. R. Co. was to pay three-fifths of the cost of a viaduct over a street and the city the remainder. The law then provided that cities should keep such viaducts in repair. Later the law was changed so that cities might require railroad companies to build and repair viaducts and proceed aginst them by mandamus in case they neglected to do so. Railroad company contended that this was an impairment of a contract protected by the Constitution.

"Held: The agreement constituted a contract, in the sense that the respective parties thereto continued to be bound so long as the legislation, by virtue of which it was entered into, remained unchanged. But it was a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

"Usually where a contract not contrary to public policy has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things with which the public has no concern, but are persons and corporations whose rights and powers are created for public purposes, by legislative acts, and where the

subject matter of the contract is one which affects the safety and welfare of the public, other principles apply.

"Contracts of the latter description are held to be within the supervising and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. **The presumption is that such contracts are entered into with the knowledge that parties cannot by making agreements on subjects involving the rights of the people, withdraw such subjects from the police power of the legislature.**

"However this may be, we think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company in respect to such crossing, saving any rights previously vested."

City Cannot Divest Itself of Police Power.

City of Tacoma vs. Boutelle, 112 Pac. at 665. "It is universally held that a municipality cannot transfer its right to exercise the police power to any other agency, nor can it in any way bind itself not to exercise such right.

"We believe it to be equally well settled that it was not within the power of the city in any franchise it may have conferred upon a railroad company to divest itself of the governmental police power, the exercise of which is necessary for the public welfare and the preservation of the public safety."

Coatesville vs. Coatesville Elec. Light & Power

Co., 32 Pa., Superior Court, 513. "A municipality cannot bargain away its right to exercise at all times its police power, nor enter into any contract by which the free exercise of the police power which is delegated to it by the state can be abridged, limited or destroyed."

Elliott on Railroads, Section 1082.

Joyce on Franchises, Section 366,

Abbott on Municipal Corporations, Section 854,

St. Louis & San Francisco Railway Co. vs. Mathews, 165 U. S., 1.

McQuillan on Municipal Corporations, Section 473. (Quoted in Tacoma case). "The power is continuing, and no grant that can be made can legally destroy it; therefore, a municipal corporation in granting franchises for the use of its streets may not divest itself of the authority of control and regulation. It is true under our constitutional system that neither vested rights can be destroyed, nor the obligation of contracts impaired. But the public necessity may legally limit or control these fundamental rights only in the reasonable exercise of the sovereign police power."

San Jose vs. San Jose & Santa Clara R. R. Co., 53 Cal., 475. "A railway franchise is not a contract in such sense as to exempt roads from proper police regulations, or from taxation as other occupations are taxed."

In re Ackerman, 6 Cal., App., at 9. "But counties, cities and towns are not required to seek in any legislative enactment for the source of their power to make and enforce within their respective limits all local, police, sanitary and other regulations which they may deem needful and requisite for their welfare and that of their inhabitants. The constitution has, by direct grant, vested in them plenary power to provide and enforce such

police, sanitary and other local regulations as they may determine shall be necessary for the health, peace, comfort and happiness of their inhabitants, provided such regulations do not conflict with the general laws.

"And the Legislature has no authority to limit the exercise of the power thus directly conferred upon the cities, counties and towns by the organic law."

County of Plumas vs. Wheeler, 149 Cal., 762. "It is within the legislative discretion to place such restrictions upon the use of any property or the conduct of any business as may be reasonably necessary for the public safety, health or comfort."

Ex parte Whitwell, 98 Cal., 73. "The police power, the power to make laws to secure the comfort, convenience and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested."

Cincinnati vs. the City of Connersville, 83 N. E., 503. "The police power springs from the fundamental principle that every property owner must so use his own property as not to injure the safety, health and general welfare of the community. It operates upon an existing evil that affects the morals, health and general welfare of the community, and is a power to which every person and corporation must yield."

Chicago, St. Paul and M. & O. Ry. Co., vs. Douglass County, 114 N. W. 511. "The state cannot by express grant deprive itself of its police power."

Chicago vs. the Chicago Union Traction Co., 199 Ill., 259, 59 L. R. A., 666 (1902). "A municipality cannot in granting authority to a street car company to operate cars in a street deprive itself

of the power to compel the company to clean the streets between the outside rails if the exercises of such power is necessary to the health and comfort of the people."

Wabash Railway Co. vs. Defiance, 167 U. S., 88. Held: "An ordinance to control and improve streets will override any license previously given by which control of the street has been surrendered to an individual or a corporation. The right of the city to improve its streets, or re-grading or otherwise improving them, is something so essential to the growth and prosperity that the common council cannot any more denude itself than can its power for the health, safety and morals of its inhabitants."

German Insurance Co. vs. Commonwealth, 133 S. W., 793, 141 Kentucky, 606 (1911). "While the federal constitution forbids any state from impairing by constitution or law the obligation of a contract, a state cannot contract away its police power, or its right to abrogate contracts made in controvention of such police power."

The constitutionality or legality of a statute or ordinance is presumed until it has been overthrown by the arguments opposed.

In re Thomas, 10 Cal. App., 375. "Where no abuse of discretion appears, it will be presumed that the legislative body acted wisely (and fixed proper boundaries) in the use of its police power."

In re Flaherty, 105 Cal., 362. "It is impossible to state in express terms the extent and limitations of what is known as police power, and the courts have not attempted to do so. Whether or not that power has been exceeded must be determined as the case arises."

People vs. Zimmerman, 11 Cal. App., 115. "It must be presumed that an ordinance duly passed

continues to exist, and the burden of proof is upon the defendant to show the repeal and non-existence thereof."

People vs. Haynes, 83 Cal., 111. "Every presumption is in favor of constitutional enactments. One who assails the constitutionalty of a statute must not only overcome the strong presumption in favor of its validity, but must show that by natural and necessary import of the language, it is clearly in conflict with the supreme law. Doubt as to the construction of a statute must be resolved, if possible, in harmony with the constitution."

This was approved in 144 Cal., at 271.

In re San Chung, 11 Cal. App., 517. "It is not sufficient that the court may entertain a doubt as to whether the legislative body has exceeded the limits of its constitutional authority, but it must clearly appear that some fundamental right of the individual has been invaded and a personal privilege unfairly impaired or destroyed before an ordinance duly enacted can be declared invalid."

The Reasonableness of Ordinances.

The question of whether the ordinance is reasonable or not, and therefore a proper exercise or police power, is one for the court to decide.

Merced County vs. Fleming, 147 Cal., 46, at 51. "I find practical unanimity of opinion that whether an ordinance be reasonable or not is a question for the court and is a question to be determined from the face of the ordinance. The provision must be upheld, unless as a matter of law the court can say that it is so unreasonable in

character as to transcend the proper exercise of the right by the law making power. It is not a question of fact to be determined upon the varying circumstances of each particular case.

"Proof of the existence and identity of the ordinance offered should by rights be all that is required of the prosecution in any case until some showing has been made that there was irregularity in the enactment of the ordinance."

Validity of Sprinkling Ordinances.

Ordinances requiring the street railways to sprinkle their road beds so as to keep down the dust have generally been approved by the court and by the text writers.

Elliott on Railroads, Section 1082. "A municipal corporation cannot by contract surrender or alienate its governmental or police powers which the public welfare demands it should exercise. All right granted to a municipality or contracts made by it with reference to the use of the streets are subject to its exercise of its police power, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable regulations and ordinances enacted by the city in the exercise of its police power. Thus it has been held that a municipality may enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling the tracks."

Tiedemann on Limitations of Police Power, Section 194. "There is no more need for judicial determination of the limitations upon police power in the regulation of the management of railroads than in any other. The same principles govern its exercise in every case. Every one, whether a corporation or a natural person, must

so enjoy and make use of his rights as not to injure another; and the State may institute whatever reasonable regulations may be necessary to prevent injury to the public or private persons. Here, as elsewhere, however, the exercise of police power must be confined to those regulations which may be needed, and which do actually tend to prevent the infliction of injury upon another."

Dillon on Municipal Corporations, Fifth Edition, Section 1276. "Under its police power and authority over streets, a city may require street railways to keep their tracks watered so as to be free from dust."

Elliott on Roads and Streets, Section 958. "Within the limitations suggested in the last preceding section (that of being reasonable) the municipal authorities control and regulation is pretty extensive. It has been held under a municipal charter grant that the City Council had power to make, ordain, and establish such laws, ordinances and regulations as shall appear to them requisite and necessary for the convenience of said city and for the security and welfare of said city, and for preserving health, peace and good government within the limits of the same, that the council may lawfully enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its track, and to remove snow thrown upon it."

The doctrine of this case will be found on examination to be well supported by the decisions in numerous cases, for the power to protect life and property is very comprehensive.

43 Ill., 209.
84 Mo., 119,
1 Allen, 187,

31 Minn., 452,

199 Ill., 259,

14 Mo. Ap., 459,

34 Indiana, 392.

Nellis, Street Railways, Section 157. "It is within the police power of the city to provide by ordinance that corporations operating street railways within the limits of the city shall water their tracks so as to effectually lay the dust between the rails. Such an ordinance tends to promote the comfort and convenience of the passengers and the health of the inhabitants of the city."

McQuillan on Municipal Corporations, Section 3774. "Mandamus lies to compel street railways to perform its duties imposed by ordinance to sprinkle the part of the street occupied by its tracks."

Wilcox, Municipal Franchises, Vol. 2, page 691. "Street cars do add materially to the necessity for sprinkling the streets. Not only is dust manufactured by grinding up the materials that fall upon the track, but the rapid movement of the cars tends to dry up the surface of the road, to make dust and to create a nuisance for both users of the street and abutting owners. Moreover, the sprinkling of the street can be more economically and easily done by the use of sprinkling cars than otherwise. It seems, therefore, a reasonable requirement that the street railway company should sprinkle not only to the width of the tracks, but to the entire width of the road. The city should, however, furnish all the water required for sprinkling, without charge to the company."

Milwaukee vs. Milwaukee E. R. & L. Co., 144 Wis., 386 (1911). "An ordinance was passed requiring street railways to sprinkle the entire roadbed of their tracks. Mandamus was brought to compel the railway to comply. It was con-

tended that the city had no authority to pass such an ordinance. The city justified on three grounds: 1. Charter provision authorizing it to provide for watering the streets. 2. Broad police powers empowering it to pass legislation to abate nuisances and conserve public health. 3. Statute of 1898.

"Held: City has right to pass reasonable rules and regulations as to the operation of the road. Ordinances requiring street railways to sprinkle the streets have been upheld by a number of courts. No decision to the contrary has been cited and we have found none. Only in a case which is clear beyond a reasonable doubt will courts declare laws void which are adopted under the police power in the interest of the public health. The validity of a city ordinance is tested by the same rule. We entertain no doubt that the power existed to pass an ordinance of the general character of the one adopted.

"This ordinance is not void because discriminatory. In the matter of setting dust in motion, street cars are in a class by themselves. Their cars are large and heavy and run at a high rate of speed and with great frequency. The bodies of such cars rest close to the surface of the street. They occupy a very considerable of the best portion of the street to the exclusion of the general public, a large part of the time. They run on tracks which create peculiar conditions for the accumulation of dust and dirt, and they occupy the streets by permission of the common council and not as a matter of absolute right. No other agency stands on the same footing with street cars in the matter of raising dust. Of course, many different kinds of vehicles occupy the street and stir up more or less dust when the necessary conditions exist, but it does not follow that because all are not called upon to contribute all must escape. The purpose of this law is to pro-

vide for the sprinkling of a well defined portion of the public streets of a city. The appellant has under the franchise granted to it a paramount right to use and occupy this particular part of the street. In doing so it is largely responsible for setting in motion the dust that rises therefrom, and is thus in a class by itself."

Savannah Railway vs. Mayor of Savannah, 77 Ga., 731. The police court fined the railway for neglecting to water its track. Reasoning of the court: "Surely to keep down the dust from the railway tracks by watering them on its street within the city limits is a very requisite and necessary thing for the welfare and convenience of the inhabitants on the streets over which the road is constructed, to say nothing of the health preserving effect.

"It follows that the charter of the city authorizes the ordinance. Even if the company did not submit itself by its franchise to the police regulations and ordinances of the city, it would be subject thereto.

Nor do we see that the ordinance is partial and not general, so as to vitiate it. It affects alike all railways traversing the streets, and thus embraces impartially every person that runs continuously and constantly on the streets, and raises this inconvenient dust constantly when the track on which such person runs is left unwatered. It embraces all who exercise the same right and work the same inconveniences to occupants of houses on the streets."

State vs. Canal Co., 50 La. An., 1189; 56 L. R. A., 287. Defendant, through its president, was sentenced to pay fine of $25.00.

"It is the right to use and not to abuse that the franchise confers. It is evident that the city cannot barter away her police powers; nor can she by her contracts stop herself from exercising the power of suppressing nuisances or preserving the public health and the comfort and cleanli-

ness of the inhabitants of the city. It is equally evident that an ordinance which requires that a public business should be so conducted, or a public franchise so operated, as not to be detrimental to the public health or the cleanliness and comfort of the people of the city does not deprive the owner of such a franchise of its property without due process of law or adequate compensation. It was a physical impossibility for the company to operate its cars without producing dust, so the council attempted to do the very thing which, in our opinion, it was possible for them to have done; that is, to require the corporation to water the tracks so as to effectually keep the dust laid.

"On reason and authority we are of the opinion the ordinance of the city council of the City of New Orleans must be sustained as a legal exercise of the police power, and as neither indefinite nor unreasonable."

5 Pa. Dist. Reports, 609. Chester vs. Chester Traction Co. Ordinance requiring defendant to sprinkle streets between rails to keep down dust and avoid discomfort for persons on highways.

"The right of the city to sprinkle its streets in order to keep down dust comes within the duty of a city to preserve the sanitary condition of the municipality. Under her charter and the several Acts of the Assembly relating to street railways, the city can by ordinance, require companies to sprinkle that portion of the streets used almost exclusively by them. In other words, to require them to keep down the dust they raise is but a reasonable exercise of the city's power. The ordinance of the city upon the subject, therefore, **appearing to be** reasonable, must be obeyed."

This case was reversed in 4 Pa. Superior Court, 575 on ground that the sprinkling required would become a nuisance in winter when the water would freeze. Therefore unreasonable and void. Refrain from de-

ciding whether an ordinance requiring sprinkling by street railway at proper times and seasons and making due allowance for scarcity of water in cases when and where such scarcity might exist, would be valid exercise of authority by a municipality.

> St. Paul vs. Haugbro, 93 Minn., 59; 66 L. R. A. 441. "According to the undisputed evidence, and it is a matter of common knowledge, the dust and filth which accumulates on the streets is laden with disease germs, and, when caused to float through the air, is a menace to the public health. The extent of the danger varies according to the density of the population and amount of traffic. It is less in the outlying districts than in the business centers; but reasonable regulations with respect to it are as clearly within the legislative power of the city council as the regulation of the smoke nuisance."
>
> St. Paul vs. St. Paul City Ry. Co., 130 N. W., 1108 (1911). "An ordinance was passed October, 1909, that each and every person, company and corporation operating any street car line or lines within the city of St. Paul, Minnesota, shall water their tracks so as to effectually keep the dust laid on the same while the cars are in operation; provided, however, that such water shall not be applied when the temperature is at or below freezing point. Penalty one hundred dollars or one hundred days in jail."

The ordinance granting the railroad franchise provided expressly for keeping the track clean and in good repair two feet outside of track and for removing snow. The tracks in question ran three and one-half miles through almost uninhabitated territory.

> Held: "That it was no defense that there might be created a monopoly of water, or that oil

would be more efficient, or that such sprinkling could be expensive."

Passenger Railroad Co. vs. Birmingham, 51 Pa., 41. "Ordinance giving consent to occupancy of street provided that railroad company should keep street in perpetual good order and repair. Company admitted its obligation to repair the paving, but demanded to be reimbursed for $125 paid for scraping and cleaning."

Held: "The duty of cleansing, that is 'keeping in good order,' fell upon the railroad company."

Mayor of the City of Baltimore vs. Baltimore Trust & Guaranty Co., 166 U. S., 673.

Dust a Menace to Health

Ex parte Lacey, 108 Cal., 326 at 328. "In the exercise of its police power and sanitary power the city has attempted to regulate the business of beating carpets by steam-power. Under its constitutional grant it had the right to regulate this business. The use of steam-power of itself within municipal territory has always been recognized as a proper subject of regulation; and in addition here it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, are a constant source of danger and a menace to good health and the general welfare of the neighborhood where located."

Jurisdiction of the Police Court

People vs. Palermo Land and Water Co., 4 Cal. App., 717, 722. "Misdemeanor for not furnishing water for irrigation as required by county ordi-

nance. Action filed on information by district attorney. Objected that case should have been tried in justice court. Appellate court said superior court had no original jurisdiction."

The Supreme Court in denying the applications to be heard said: "It is proper to state that Section 1427 of the Penal Code apparently furnishes a rule of procedure in the case of a corporation charged with misdemeanor liable in a justice's court or a police court."

(1427. Penal Code. After appearance the same proceedings must be had as in other cases.)

State vs. Poulterer, 16 Cal., 514.

Ordinances of Different Cities.

Ordinance of City of Chicago. Brundage 1911, Sec. 2159).

"Every person or corporation operating or manufacturing street railway tracks located in and along the different streets within the city, shall, except as otherwise expressly provided in the respective ordinances under which tracks have heretofore been or may hereafter be authorized to be laid, when ordered so to do by the commissioner of public works, keep moistened and well sprinkled with water in a manner satisfactory to the commissioner of public works the several streets upon and along which they, or either of them, may operate or maintain his or its respective tracks.

"Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense, and a separate and distinct offense shall be deemed to have been committed each and

every day on which said person or corporation shall neglect, fail, or refuse to comply with any of the provisions of this section."

Ordinance of Memphis. Hyrehey's Digest 1909, Sec. 1108.

"The owners of all street cars and other vehicles which move continuously over the streets of the city, and where the tracks, running gear or bodies of said cars are within eighteen inches of the surface of the street, shall cause the tracks and portions of the street used or passed over by said cars or vehicles and a space of two feet on each side of the track passed over by such cars or vehicles, to be kept at all times clear and free from dust by sprinkling the same with water, and such sprinkling shall be done as often and at such times as may be necessary to accomplish the purpose aforesaid.

Section 1109. "Fine $5 to $50. Each day a separate offense."

Woorner, Revised Code of St. Louis, Section 1901.

"In order to promote and preserve the public health and as a police regulation, all street railway companies or persons or corporations owning or operating street railway cars upon the streets, avenues, highways, or public places of this city shall, from and after ninety days from the approval of this ordinance, for the purpose of laying the dust which may be created by the movement of the said cars, sprinkle with water such portions of the streets, avenues, highways, or other public places occupied by them with their tracks and the space or spaces between such tracks. Said sprinkling shall be done between the hours of six o'clock in the morning and nine o'clock in the evening of each and every day of the year, except on such days or parts of days as the street shall be

laid by dampness, rain, snow or other natural causes, and except on such days when the weather shall be so cold that sprinkling would be impossible by reason of the freezing of the water."

Section 1902. Specifies the device to be used for sprinkling.

Section 1903. Penalty not less than $10 nor more than $500. Each day's failure a separate offense.

Ordinance Void in Part.

San Luis Obispo Co. vs. Greenbert, 120 Cal., 306. "In our opinion, all provisions of the ordinance which can be rightly claimed to be void for any reason are distinctly separable from the remainder, and after eliminating them the provisions remaining are sufficient to constitute a complete and valid ordinance.

"This being so the ordinance must be upheld, for nothing is better settled than that if the part of a law or ordinance which is invalid is distinctly separable from the remainder, then the latter can stand and the former be rejected."

Ex parte Christensen, 85 Cal., 208,

San Luis Obispo vs. Pettit, 87 Cal., 499.

Ex parte Haskell, 112 Cal., 420.

Public Utilities Act.

Constitutional Amendment Adopted March 28th, 1911, (p. 162).

From and after the passage of the legislature of laws conferring powers upon the railroad commission

respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county or incorporated city or town, as, at an election to be held in pursuance of laws to be passed by the legislature hereafter, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired.

(Further proviso for surrendering or reinvesting such powers later).

Provisions of the Act, Section 82.

This act shall not affect such powers of control over any public utility in any city and county or incorporated city or town as, at an election to be held pursuant to laws to be hereafter passed by the legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and **until such election such powers shall continue unimpaired in such city and county, or incorporated city or town;** but if the vote so taken

shall not so favor the continuation of such powers, they shall thereafter vest in the commission.

(Further provision for surrendering or reinvesting such powers.)

Newcomb vs. Norfolk Western Street Ry. Co., 179 Mass., 449 (1901). "Petition for an order compelling railway to water street in accordance with a restriction contained in the ordinance of location."

Held: "That the requirement that the Company shall water streets was a lawful restriction. The well known effect of running cars is to raise a dust, and the requirement, though affirmative in form, in substance restricts the respondent to running cars in such a way as not to raise a dust. There will be no difficulty in the specific enforcement of the street watering."

144 Wis., 386, 124 N. W., 623. "Ordinance requiring street railway to sprinkle the part of the street occupied by it is not void as discriminating in favor of the users of automobiles and other vehicles who are not compelled to bear like expense." (1911).

Conclusion.

Defendants in error herein conclude that Ordinance No. 95 was enacted under the clear authority of the Police Power of the State conferred upon the City of Sacramento. Such ordinance was not unreasonable or void in any particular and did not impose upon Plaintiff in error any burden which it was not its bound in duty to fulfill.

Wherefore, the Defendants respectfully submit

that the judgment of the District Court of Appeal in the Third Appellate District of the State of California should be affirmed by this Honorable Court.

Dated, Sacramento,
October 16, 1919.

ARCHIBALD YELL,
City Attorney of Sacramento,

and

HUGH B. BRADFORD,
Attorneys for Defendants in the Above Entitled Case.

Edward M. Cleary,
of counsel

PACIFIC GAS & ELECTRIC COMPANY *v.* POLICE COURT OF THE CITY OF SACRAMENTO, STATE OF CALIFORNIA, ET AL.

ERROR TO THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA.

No. 31. Submitted October 9, 1919.—Decided December 8, 1919.

When an intermediate state court assumes jurisdiction and renders a judgment which the state Supreme Court declines to review for want of power, the writ of error to review federal questions involved runs to the judgment of the intermediate court, and the jurisdiction of that court is not subject to question here. P. 24.

In the absence of any particular contract provision touching the subject, the question whether an ordinance requiring a street railroad company to sprinkle the street within and near its tracks imposes an undue burden, in view of its general right to operate the railroad under its franchise, is a question of police power and does not involve the contract clause. P. 25.

A city ordinance requiring a street railway company, without cost to the city, to sprinkle the street occupied by its railroad, between the rails and for a sufficient distance beyond to lay the dust and prevent it from rising when cars are in operation, is within the police power. *Id.*

Such an ordinance does not violate the equal protection clause in dis-

criminating between street railroad cars and other vehicles on the same streets. P. 26.

28 Cal. App. 412, affirmed.

THE case is stated in the opinion.

Mr. Wm. B. Bosley for plaintiff in error.

Mr. Archibald Yell, Mr. Hugh B. Bradford and *Mr. Edward M. Cleary* for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By ordinance the City of Sacramento provides: "every person, firm, or corporation owning, controlling or operating any street railroad, suburban railroad, or interurban railroad upon and along any of the streets of the City of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation."

The Gas Company, plaintiff in error, operated lines of street railway in Sacramento under franchise granted by the city. It refused to obey the ordinance and was prosecuted in the city police court and there asserted that the ordinance was in conflict with the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

From a sentence imposing upon it a money penalty, it appealed to the Superior Court for the County of Sacramento, and from the judgment of that court confirming

the conviction it prosecuted an appeal to the Supreme Court of the State, which court refused to review the case on the ground that it was without jurisdiction. Thereupon the Company, alleging the illegality of the conviction upon various grounds, among others that the ordinance was repugnant to the Fourteenth Amendment, petitioned the District Court of Appeal for the Third Appellate District for a writ of certiorari requiring the Superior Court to send up the record for review. The petition was demurred to as stating no cause of action and on the further ground that it disclosed no jurisdiction in the court to review. Although it expressed doubt on the subject, the court took jurisdiction, reviewed the conviction, held that the city had power under the state constitution and laws to pass the ordinance and that it was not repugnant to the Constitution of the United States. The certiorari was refused. A review of this judgment was then asked at the hands of the Supreme Court of the State, but that court again refused to interfere on the ground of its want of jurisdiction. The writ of error which is before us was then prosecuted by the Gas Company to the judgment of the District Court of Appeal refusing to grant the writ of certiorari.

At the threshold a motion to dismiss requires to be considered. It is based upon the ground that the court below had, under the state constitution and laws, no power to review by certiorari the action of the Superior Court and therefore that court was the court of last resort competent to decide the cause. But this disregards the fact that the District Court of Appeal assumed jurisdiction of the cause and that the Supreme Court of the State declined to review its judgment for want of jurisdiction. As whether, under the circumstances, the District Court of Appeal rightfully assumed jurisdiction by certiorari is a question of purely state law which we may not review, the judgment of that court is the judgment of the state

court of last resort having power to consider the case and the motion to dismiss is denied.

Besides the due process and equal protection clauses of the Fourteenth Amendment, the contract clause of the Constitution of the United States is relied upon in the assignments. In argument, however, that contention is based, not upon the impairment by the ordinance of any particular contract right, but upon the unwarranted burden which it is asserted would result from enforcing the ordinance as against the railroad company because of the general authority which it possessed under its franchises to operate its railroad in the streets. But this at once establishes that the consideration of the contract clause is negligible and hence that it is only necessary to pass upon the contentions under the due process and equal protection clauses. This results, since, if the police power of the city, to provide by the ordinance for the protection of the health and safety of the people, was unrestrained by any contract provision, the police power necessarily dominated the right of the company under its franchises to use the streets and subjected that right to the authority to adopt the ordinances in question.

Further, as the right of the city to adopt such ordinance, so far as the state constitution and laws are concerned, is concluded by the decision below and as it is elementary that the due process clause of the Fourteenth Amendment does not restrain the States in the exercise of their legitimate police power, it follows that the case narrows down to a consideration of whether the ordinance in question was generically embraced by the police power of the State and, if it was, whether the power was so abused as to cause its exertion to exceed the limits of the police power, thus bringing the ordinance under the prohibitions of the due process and equal protection clauses of the Fourteenth Amendment.

That the regulation made by the ordinance was in-

herently within the police power is we think too clear for anything but statement. We cite in the margin, however, decided cases dealing with the subject, in some of which the power here in question when exerted for the same purpose and to the same extent was upheld, and in others of which, although the manifestations of the exercise of the power were somewhat different, its existence was accepted as indisputable; and text writers who state the same view.[1]

That the power possessed was on the face of the ordinance not unreasonably exerted and therefore that its exercise was not controlled by the due process clause of the Fourteenth Amendment is, we are also of opinion, equally clear. And this is true likewise of the contention as to the equal protection clause of the Amendment, since that proposition rests upon the obviously unwarranted assumption that no basis for classification resulted from the difference between the operation of the street railway cars moving on tracks in the streets of the city and the movement of a different character of vehicles in such streets.

Affirmed.

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[1] *Milwaukee* v. *Milwaukee E. R. & L. Co.*, 144 Wis. 386; *City & Suburban Ry. Co.* v. *Mayor of Savannah*, 77 Ga. 731; *State* v. *Canal & C. R. R. Co.*, 50 La. An. 1189; *St. Paul* v. *St. Paul City Ry. Co.*, 114 Minn. 250; *Newcomb* v. *Norfolk Western Street Ry. Co.*, 179 Mass. 449; Elliott on Railroads, § 1082; Dillon on Municipal Corporations, 5th ed., § 1276; Nellis, Street Railways, § 157; McQuillin on Municipal Corporations, p. 3774; Elliott on Roads and Streets, § 958.